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16 C. C.

REPORTS OF CASES,

UPON

Appeals and Writs of Error;

IN THE

High Court of Parliament;

From the Year 1697, to the Year 1709.

WITH

TABLES, NOTES, and REFERENCES;

BEING

A SUPPLEMENTARY VOLUME TO

BROWN'S CASES IN PARLIAMENT.

By *RICHARD COLLES, Esq.*
BARRISTER AT LAW.

DUBLIN.

PRINTED by E. LYNCH, No. 6, Skinner-Row, and in
the Four Courts.

M.DCC.LXXXIX.

22

PRINTED BY H. L. ...

BY RICHARD GO ...

**MUSEUM
BRITANNICUM**

... and ... of ...

C. Y. 2 ...

R. E. B. O. R. T.

TO

THE RIGHT HONOURABLE

JAMES, LORD VISCOUNT LIFFORD,
OF LIFFORD,

LORD HIGH CHANCELLOR

OF

IRELAND.

MY LORD,

WITH my most humble duty I present to your Lordship these Reports, the fruit of that diligence which first introduced me to the honour of your Lordship's protection.

The recent unanimous testimony of the affection of the Irish Bar, to our loved and respected CHANCELLOR, would justify the warmest encomium of an Individual, who, in that moment, felt the liveliest transport of gratitude, could any Individual appropriate your Lordship's praise, when the united Voice of Ireland, declares that, whilst Integrity, Learning and Affability, shall be estimable in the highest seat of Justice, *Honos nomenque tuum laudesque manebunt.*

Suffer me, however, my Lord, to consider myself, in particular,

Your Lordship's

DUBLIN,
Stephens'-Green,
28th Jan. 1789.

Most obliged, and obedient Servant,

RICHARD COLLES.

A

P R E F A C E.

THE Editor of the late Reports of Cases adjudged in Parliament, laments in his Preface that he was not able to procure any of the cases prior to the year 1702; many of which were said to be of great weight and consequence: The greater number of these cases are now offered to the profession. The usefulness of this publication cannot be doubted. It remains only to satisfy the Reader how these cases, which could not be procured in England, happened to be preserved in Ireland, and to evidence the authenticity of these reports.

The late Reverend Mr. *Stuart Lynch*, about a year ago, handed to the Editor two folio manuscript volumes, of cases adjudged in parliament, transcribed with great neatness and correctness, which he assured the Editor were the collection of a Right Honorable and learned Baronet, some time retired from the Bar in Ireland*. These volumes the Editor read with great attention, and found amongst them many of the cases already reported by *Shrew* and *Browne*, which, upon perusal, agreed with the printed reports of those cases: This left him no room to question the fidelity of the other copies: Some few others he selected from the printed collection of the late *William Harward*, Esq. which were with great kindness lent him by a gentleman of great learning, who, though many years retired from the Bar, expressed his desire of being serviceable to the profession*.

The method in which this work is pursued, is not exactly that adopted by Mr. *Browne*: A fair and full report of each case is collected from the cases at large on either side, not according to the imagination of the author, but from each party's own statement; facts are stated from

* Sir Lucius O'Brien.

+ Robert Thorpe, Esq.

the case of the respondent, wherever it hath been found to vary from the appellants' statement; otherwise, the judgment of the Lords being general, it must be difficult in some instances to reconcile the judgment with the case, as stated at one side only; in a few instances, the case of one party is wanting in the collection from which this volume is composed; these instances are faithfully adverted to, and the deficiency in some measure supplied; the REASONS of each party here make part of the respective case, the names of the counsel who signed the cases are inserted in the margin at the foot of each case, together with the final determination of the case as it appears in the journals of the house, with the exact date of each; the state of the process of the cause before the Lords is carefully added; and a correct reference to the volume and pages of the journals; correct marginal references are also made to the several books wherein each case hath been reported, abridged, or cited; a table of the principal matters is added; and a correct one prefixed of the names of the cases; but though there be in this collection many NEW CASES, the editor hath not distinguished these by any character, the late edition of the *Repertorium Juridicum* rendering such a distinction an easy entertainment to every reader; this volume fills up in a very great measure the chasm between *Shower* and *Brown*: It however appears from the journals and from our books of reports, that a great number of other cases have received the final judgment of the Lords in that period, which have not yet been published: The present volume contains a few cases, subsequent to the period at which *Brown* commences, and the editor hath collected near 200 more, among a few volumes of printed cases, which he hath been favoured with but at periods too distant from each other, and from the present, to form a part of this publication.

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NAMES of the CASES

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CASES

C A S E S

HEARD AND DETERMINED

IN THE

High Court of Parliament.

George Horner, Thomas Beare, Esqrs.
and others, Trustees of *Warwick*
Bampfild, Esq. deceased, for Pay-
ment of his Debts and Legacies,
and of the Debts and Legacies of
Henry Rogers, Esq. deceased, and
Sir Coppleston Warwick Bampfild,
Bart. and *John Bampfild*, both
Infants,

Petitioners.

Alexander Popbam, Esq.

Respondent.

18th January, 1697.

THIS was a case different from the ordinary pro-Case 1.
ceedings upon appeals in Parliament. It was a pe-
tition to the Lords, for leave to proceed on bill of re-
view and reversal, brought by the Petitioners against a
decree of the Court of Chancery. And the case made
by the Petition was as follows:

Henry Rogers, in May, 1672, devised his estate to
Warwick Bampfild, and others, for payment of his
debt.
B

1697.

debts and legacies, which amounted to 16,000*l.* and devised the surplus of his estate to *Alexander Popham* for life, remainder to all his sons in tail male, upon this express condition, that if *Alexander* should die without issue male, or if *Sir Francis Popham* his father should not, in his life-time, settle two parts in three of the estate, which was settled on *Sir Francis* on his marriage, on said *Alexander* and his heirs male, then in default of such settlement, testator devised part of his estate to *Warwick Bampffield* and his heirs, and the residue to others, all as near of kin to testator as *Alexander* was: and though no such settlement executed, though requested and sued in Chancery to do so, yet *Alexander*, after his father's death, brought a bill in Chancery to be decreed to the estate devised, and to an account of the profits, suggesting that his father had settled an equivalent on him, and on the hearing of that cause, the court decreed an inquiry by the Master, whether such equivalent were settled or not, and further directed the trustees to account with *Alexander* for the profits.

13th Nov.

1682.

1 Vern.

79.

2d June.

Lords

In June, 1685, *Bampffield* appealed to the Lords from Journals, that decree, complaining that such account was decreed vol. 14. P. to *Popham* before it appeared that such equivalent

27.

was settled: to this appeal, Mr. *Popham*, in the same month, put in his answer; after which that Parliament was prorogued, and no other Parliament was held till

*Popham*and *Bamp-**field.*

The Parliament being prorogued, you may proceed in the account in this Court notwithstanding the appeal. 1 Vern. 344.

1689; notwithstanding which proceedings before the Lords, the Court of Chancery proceeded in the cause, and on the first of July, 1688, the Master reported that legacies of *Rogers*, to a considerable amount, remained unpaid, and in order to shew that *Sir Francis Popham* had settled an equivalent, the Master valued the estate of *Sir Francis*, which had come to *Alexander*, at twenty years purchase, though he was only tenant for life thereof under his father's will, and did not report debts and legacies of *Sir Francis*, though to a great value, and chargeable on that estate, but in this manner reported that *Sir Francis* had left an equivalent to his son *Alexander*. To this report exceptions were taken; but 7th December, 1686, the report was confirmed; and 29th February, 1687, on *Bampffield's* petition, stating that the manner and quality of the settlement was not certified by the Master, pursuant to an order of the third day of July, 1683, the Court discharged that order.

The

The cause upon the appeal was heard first *July*, 1689, and the appeal dismissed, and notwithstanding such report concerning the equivalent or any other of the subsequent proceedings were not, nor could be, in judgment before the Lords on that appeal; yet *Popham* insisted, that the Petitioners were concluded from controverting the supposed equivalent, and from examining into the particulars thereof; alledging that such report was made before the cause was heard upon the appeal, whereas the Petitioners contended that that report could never be in judgment before the Lords on the hearing of such appeal, the same being made thirteen months after the appeal.

Bampfild, the only surviving trustee and executor of *Rogers*, on the 18th *July*, 1693, filed a bill in the Court of Chancery, to review and reverse the proceedings had in that Court, subsequent to the appeal, and assigned divers errors therein; and *Popham*, on the 29th *July*, 1693, obtained an order to dismiss the bill of review with exemplary costs, unless cause in *Michaelmas* term following, suggesting that the matters assigned for errors had been heard, and in judgment before, and settled by the Lords: and 27th *October*, 1693, on *Bampfild's* shewing cause against that order, it fully appeared to the Court of Chancery, that the errors so assigned, never were, nor could be, in judgment before the Lords, these errors not having been complained of in the appeal, nor insisted on in the answer thereto: yet,

In *December*, 1693, *Popham* petitioned the Lords, suggesting that the Court of Chancery had proceeded to examine into and reverse a decree settled by the Lords, and would thereby draw their Lordships' order into examination in Chancery, and a committee was appointed thereupon to consider of the cause and proceedings therein, and report what was fit to be done: and on 3d *January*, 1693, the committee reported, That there not appearing to have been any proceedings in the Court of Chancery on the matters determined by the Lords, nothing needed to be done therein; to which report the House agreed. After which *Popham* pleaded these proceedings, and *Bampfild* replied; and before any further proceedings, *Bampfild* died; having previously conveyed his estate to Petitioners the trustees, first, for payment of his debts and legacies, and afterwards for petitioner Sir C. *Warwick Bampfild*, and his issue male; remaining

der to petitioner *John Bamfield*, and his issue male,
 and by his will confirmed such settlement.

1697.

In *Easter* term, 1695, petitioners exhibited a bill of revivor, in nature of a bill of review, to review and revive these proceedings. This bill *Popham* answered, and examined witnesses to prove that the report and matters subsequent to the appeal, were read and in judgment before, and settled by the Lords; but petitioners insisted, that though it should be admitted that the report had been read, yet it could not have been in judgment, as having been made subsequent to the appeal and answer; and petitioners alledged, that *Popham* had insisted on the same matter, by way of plea in Chancery, which had been ruled against him there, when insisted on by way of motion, and likewise ruled against him by the Lords when insisted on by his petition.

And petitioners suggested, that being but trustees for infants and debts, they were advised it was not safe to proceed without the Lords directions, which they therefore prayed, and that they might have leave to proceed on the bill of review.

The respondent *Popham*, by his answer to this petition, shewed that Sir *Francis*, his father, in 1668, married *Helena*, the niece and heir of *Henry Rogers*, with his consent; and that he and *Alexander Popham*, the respondent's grandfather, with the approbation of *Rogers*, made a settlement of a great part of their estate subject to the debts of *Alexander* the grandfather: that *Helena* died in 1671, leaving respondent, her only son; that Sir *Francis* contracted some debts, to provide for which, he, after his wife's death, suffered a common recovery of all or great part of the settled estate, and that Mr. *Rogers*, fearing his extravagance might disinherit respondent, who was then but about a year old, he, *Rogers*, merely to preserve Sir *Francis's* estate for respondent, in 1672 made his will, which is, necessarily, set out more at large than in the petition; viz. he devised his estate to the trustees in trust; in the first place, to raise money to pay his debts and legacies, and that after that performed, they should stand seized in trust to the use of the respondent for life, remainder to his first and other sons in tail male. And by a subsequent substantive clause in

in the will, declared, that if respondent died before twenty-one, without heir male, then the trust limited to respondent, to be void; and in case Sir *Francis Popbam* should not, on request of the trustees, convey and settle on respondent and his heirs male, two full parts in three of all the estate settled by *Alexander* the grandfather on the marriage of Sir *Francis*; that respondent should then have no benefit of said devise, but that the same should be void: and that after refusal by Sir *Francis* to make such settlement, the trustees should stand seized upon other trusts; and that testator died 2d *September*, 1672, respondent being then about three years old.

In *June*, 1674, the executors of *Rogers* filed a bill in Chancery against Sir *Francis Popbam*, to discover whether he had made any, and what settlement, according to the condition aforesaid; and on the 8th of *July* following, Sir *Francis* answered, that he had, by *Rogers's* consent and direction, made a settlement; and if that was not sufficient, was ready to make a further settlement under the direction of the Court: and the executors rested satisfied during the life of Sir *Francis*; who never after sold or parted with any part of his estate; but to prevent all cavil on account of the condition on the 10th of *August*, 1674, devised his whole estate to respondent, subject to his own and his father's debts and legacies, which last were known to *Rogers* at the time of the marriage settlement, and were thereby provided for, and died in *August*, 1674; which estate was greater in value to respondent, than required by *Rogers's* will, by above 50,000*l.* exclusive of timber, plate, jewels, and house furniture, worth above 50,000*l.* more.

But *Bampfild*, and the other trustees and devisees over, insisted that the condition in *Rogers's* will was a precedent condition, and that not being literally performed, no estate ever vested in respondent; who, therefore, in 1680, filed his bill in Chancery, to be relieved against the supposed breach of this condition, which he insisted was a condition subsequent and not precedent: and 13th *November*, 1682, Lord Chancellor *Nottingham* decreed, ¹ *Vern.* that a Master should inquire whether respondent's father had left him an estate equivalent to the condition, and declared, if so, he would relieve against the supposed breach, and that the same was a subsequent and not a precedent

1697. } precedent condition; and further decreed an account of
 1 Vern. } the profits of *Rogers's* estate, of which the trustees had
 167. } been in possession above twelve years: and on the 18th
May, 1683, the cause was reheard before the Lord
 Keeper *North*, who affirmed Lord *Nottingham's* decree:
 and on the 3d *July*, 1683, the Court, on *Bampfild's*
 application, ordered that the quality and manner of the
 settlement made by Sir *Francis* on respondent, should
 be reserved till after the Master's report of the equi-
 valent.

In *June*, 1685, *Bampfild* appealed, as stated in the
 the petition: and 12th *June*, respondent, by his guardian,
 answered in the appeal; but the Lords not having made
 any order for stay of the proceedings below, and the
 appellants not bringing on their appeal to be heard in
 Parliament, the Master, 1st *July*, 1686, reported the
 equivalent, viz.

Personal estate	-	£.	s.	d.
Plate, jewels, and household	-	3901	8	6 $\frac{1}{4}$
stuff not brought or valued				
in 10,000 <i>l.</i>				
Value of estate not settled	-	6731	9	4
Value of estate settled				
128,000 <i>l.</i> 8 <i>s.</i> 5 <i>d.</i>				
One-third of which to be		42667	2	9
added to the personal estate				

53300 0 7 $\frac{1}{4}$

Timber not included worth 40,000*l.*

<i>Alexander</i> the grandfa- ther's debts	} 23,098 0 0
Whereof paid	- 9058 0 0

Then unpaid of *Alex-
ander's* debts

Sir <i>Francis's</i> debts	} 22697 3 5 $\frac{1}{2}$
Whereof paid	} 13794 3 5 $\frac{1}{2}$

8903 0 0

22943 0 0

Refts for the equivalent over and } £. 30357 0 7 $\frac{1}{4}$
 above the debts - }

Exclusive of plate, jewels, and timber, worth above 50,000*l.* So that above two-thirds of the settled estate came clear to respondent, with such overplus, and the report referred to divers schedules.

To the draft of this report, *Bampfild* took eleven objections, which were debated and over-ruled; and afterwards filed seven exceptions to the report: and the cause was heard thereon, 7th December, 1686, before Lord *Jefferies*, who confirmed the report, and over-ruled the exceptions.

The cause was finally heard 29th February following, when the first point controverted, was touching the quality of the settlement made on respondent, by Sir *Francis*, which had been reserved by the order of 3d July, 1683; but *Bampfild* then waving that order, it was discharged, and a decree on the foot of all proceedings was drawn up, signed, and enrolled. And 1st July, 1689, the appeal was heard, and the whole matter debated before the Lords; and the equivalent being questioned, the report was read in evidence, and the appeal thereupon dismissed, and the decree affirmed: and afterwards the bill of review, and other proceedings stated in the petitions, were had.

And it was argued for the respondent, that now to give direction to the Court of Chancery to proceed below, would be in effect to unravel and set aside the final judgment of the Lords; and that to set aside the report of an equivalent, would be, in effect, to set aside the decree; for if there were no equivalent, there ought to be no decree. And that after such length of time, and expence of money, to re-examine the value of lands, as they were at respondent's father's death, above twenty-two years before: and to unravel what had been above ten years ago settled in Chancery, and allowed by the Lords, was not only a matter of dangerous consequence and great expence, but in a manner impossible to be done; and that the petitioner's proceedings tended to undermine and evade the judgment of the Lords, the supreme judicature and last resort, and was against the dignity of the Lords. Wherefore respondent prayed to dismiss the petition, and affirm the decree.

And

1697.

1697.
Lords
Journals,
vol. xvi.
p. 197.

And, *Die Martis*, 18^o *Januarii*, 1697, after hearing council on the petition of Sir C. W. *Bampfild*, and others, praying the directions of this House, for the Court of Chancery to proceed on a bill of review, to reverse a report of an equivalent in this cause, wherein petitioners were plaintiffs, and *Alexander Popbam* defendant: As also upon the answer of the said *Alexander Popbam*, put in thereto, whereby he insisted, That the said equivalent had been in judgment before, and settled by this House; it was ORDERED and ADJUDGED by the Lords, "That the said petition be, and is hereby dismissed this House, in regard it appeared, that the matters therein complained of, have been already settled by this House."

This petition seems to have been intended to feel the pulse of the House, and there is evidently a wilful confusion between the time of lodging this appeal, (which was in 1685, and is a thing always of course) and the time of its adjudication, (which was in 1689) intermediate between which, was the report complained of.

It is observable that the petitioners, in 1701, filed a bill in Chancery, for an injunction to restrain the respondent from committing waste; and for an account of what timber he had already felled, suggesting (which the Court, assisted by *Holt* and *Trevor*, Chief Justices, Sir *John Trevor*, Master of the Rolls, and *Powel*, Justice, unanimously held) that by the will, *Popbam* was made bare tenant for life, and that he had no issue, though it appears from this report, that he was then but 30 years old; and an injunction was granted accordingly.

1 P. Wms.
54-2 Vern.
427, 449.
see also
Viner. vol.
v. 80, 92,
93, 155.
viii. 87,
250, 251,
253, 258,
185, 241,
xiv. 341.
xxii. 275.

Humphry Brown, - - Appellant.
Richard Bradford, Executor of *Wil-*
loughby Pond, } Respondent.

2d March, 1698.

Case 2.

APPELLANT had brought debt against respondent, as executor, upon a bond dated 16th November, 1670, executed by *Pond* and *Leonard Upfall*, senior,

senior, and *Leonard Upfall* junior, for 200*l.* conditioned to pay 100*l.* with interest. And respondent brought his bill in Chancery, alledging he paid the debt to the appellant; who, in his answer, denied this bond paid, but confessed respondent paid him 107*l.* 10*s.* in discharge of another bond for 200*l.* dated, 7 *July*, 1671, executed by *Pond* and *Upfall* the elder, only; and though there had been three verdicts against appellant, that the bond in question was satisfied, yet he alledged that the bond of 1671 was paid in 1679; and that the executor of *Upfall* the younger had on 11th *November*, 1686, paid 9*l.* for interest on the present bond; and as the respondent alledged, he paid one bond only, when there were in truth two bonds; it was against conscience to decree him to deliver up the bond not paid, and further to pay 160*l.* costs; and insisted, if, as alledged, the bond were indeed paid, the respondents could have so proved it at law, and need not come into equity, and insisted further that the two first trials had not satisfied the conscience of the Court, or a third would not have been directed, and that it appeared fully at the last hearing, that there were two bonds, and but one paid; and that the judge (*Powel*) was not satisfied with the last verdict, and that the decree ought to be reversed.

The respondent, on the other hand, averred that *Pond* and the two *Upfalls*, in 1670 or 1671, were bound to appellant in 200*l.* to pay 100*l.* and interest, and that respondent had, after *Pond*'s death, paid that debt to appellant with interest and charges, and took his receipt; that appellant pretended he had not then the bond, but acknowledged *Pond* owed him no other money, and complained by his bill, that appellant sued him on an old bond of twenty years standing for 100*l.* entered into by *Pond* and the two *Upfalls*, which was for the same money. The cause was heard at the Rolls, 30th *October*, 1689, and an issue directed, whether the bond, dated 16th *November*, 1670, were satisfied or not; which issue was tried and found for respondent, and the cause heard on the equity reserved, and appellant decreed to deliver up the bond to be cancelled, and to pay the costs at law and in equity; and afterwards on a rehearing at the respondent's instance, in 1691, the Court directed a new trial on this issue, whether there were two bonds or not, and whether both were satisfied or not? Which issue was tried at *Nottingham*, 1692, and a second verdict

Cases in Parliament.

1698. } verdict in favour of respondents; and on a further rehearing at appellant's instance, a further issue was directed, whether the several bonds in question were satisfied or not, which was tried at *Nottingham*, 1695, and a third verdict in favour of respondent; and appellant several times moved for a new trial and was refused; and 15th *June*, 1696, the cause was heard on the equity referred, and appellant decreed to deliver up the bond of 1670, and to pay costs as before, which were taxed to 140*l.* and in *December*, 1696, appellant again petitioned for a rehearing, which petition was dismissed. And the respondent insisted that the said order and decree of the 15th *June*, 1696, had satisfied the conscience of the Court, and were agreeable to the rules of law, equity, and justice, and that the appellant ought to be concluded after so many solemn hearings and proceedings, and that the appeal ought to be dismissed.

Die Mercurii. 2^o Martii. 1697. Lords Journ. vol. xvi. 223.

And accordingly, after hearing council, the Lords ADJUDGED that the petition and appeal should be dismissed, and the decree affirmed.

Honourable *James Bertie*, and *Elizabeth* his wife, } Appellants.

Lucius Henry Viscount Falkland, } Respondents.
and others,

2d March, 1697.

Case 3.

APPELLANTS made this case: that appellant *Elizabeth* was daughter and heir of *George Lord Willoughby*, and niece and sole heir of *John Cary*, who, her parents dying in her childhood, took her to his house, bred her tenderly, and always declared her as his heir; but being justly jealous of the growth of popery in the last reign, and fearing she might marry a papist, engaged in a treaty with the late Lord *Guilford*, (a known protestant) for marrying her to the now Lord *Guilford*, and both being infants, *Cary* meant to oblige her to consent to such marriage; and therefore, about a month before he died, altered his will, and devised his estate to Sir *William Whitlock*, and others in trust,

trust, after his debts paid, for his Niece, the appellant *Elizabeth*, (in case she should within three years after his death be married to the then Lord *Guilford*, according to the form of the Church of England) for her life, remainder to her sons by said Lord in tail male, and for want of such issue, or in case the marriage should not take effect within said three years, immediately after either of said contingencies, in trust for the late Lord *Falkland* for life, afterward for his sons successively in tail male, with other remainders over; and made Sir *William Whillock*, *Roger North*, Esquire, uncle to Lord *Guilford*, and *Simon Smyth*, Esquires executors, and in about ten days after, by a codicil declared, if such marriage took effect within their ages of consent, it should be as none, unless afterwards ratified; and desired the lady *Wiseman*, sister to the late, and aunt to the now Lord *Guilford*, to have the education of her said niece; and died, leaving appellant *Elizabeth* about twelve years old, Lord *Guilford* being then somewhat younger.

Elizabeth, immediately on testator's death, according to the will, went to reside with the Lady *Wiseman*, then Countess of *Yarmouth*, and in December, 1685, by her trustees preferred her bill to have the Countess take the guardianship, and for a maintenance, and the Countess by her answer accepted the trust; and 26th December, 1685, appellant *Elizabeth*, in answer to a proposition of marriage sent her by Lord *Guilford*'s trustees, declared under her hand, "I will marry Lord *Guilford* as soon as ever he comes to his age of consent, or at any time before with the advice of my friends and relations; and I do declare "I will marry no other person whatsoever." And 23d February, 1685, preferred another bill against Lord *Guilford*, *Anthony* Lord Viscount *Falkland*, *Edward Cary*, Respondent's father, the trustees and executors, stating the will, and declaring she was ready to marry Lord *Guilford*, and praying that the trust might be executed, and the will in all things performed.

In May, 1686, the Countess refused longer to continue *Elizabeth* with her, and delivered her up in Chancery; which Court placed her with her grandmother, Mrs. *Finnes*, and always afterwards directed all things as to her fortune, residence, &c. and in May, 1667, just before Lord *Guilford*'s age of consent, *Elizabeth*'s friends sent some

1698.

Some proposals to Lord *Guilford*'s guardians for some maintenance for her out of her own estate from the marriage till they should cohabit, Lord *Guilford* being young, and about to travel; which proposals were rejected; and thereupon, in July, 1687, application was made to the Court, and the then Chancellor, Lord *Jes-feries*, declared such proposals reasonable, and fit to be insisted on by *Elizabeth*'s trustees, and that no person should persuade her to marry unless such proposals were complied with; which order Lord *Guilford*'s guardians were served with, and acquiesced, and never after renewed any address or application to *Elizabeth*; and in August, 1687, the Lord Chancellor sent *Elizabeth* to live with Lady *Hickman*, at *Gainsborough*; and added further, that no marriage should be without compliance with said proposals; and under this order she was kept with Lady *Hickman* till the three years expired; within which time, and for three years and an half longer, she did towards effecting said marriage, all that honour and modesty would permit, and neither Lord *Guilford*, nor any of his relations having made any address or application to, or taken any notice of her in the time, she afterwards married the appellant *James Bertie*, a protel- tant, and of as honourable a family as Lord *Guilford*.

Neither Anthony Lord *Faulkland* nor *Edward Cary*, during their lives, before or after her marriage, disturbed *Elizabeth*'s possession; but on Lord *Faulkland*'s death, (who survived *Edward Cary*) Respondent, about June, 1694, brought ejectments against appellants, who thereupon filed their bill; and respondent, by his guardian, filed his cross bill; which causes were heard; and the Chancellor, being assisted by the two Chief Jus- tices, the appellants bill was dismissed, and *John Cary*'s estate decreed to respondents, and the heirs male of his body; which decree the appellants insisted ought to be reversed, and that appellant *Elizabeth*, and her issue, ought not to lose the inheritance manifestly intended for them, merely because she, in her infancy, advised with her trustees, and paid obedience to the Court of Chancery, and did not perform an impossibility: and further in- sisted, that the distinction made for the respondent, be- tween a devise upon a condition precedent, and a condition subsequent, was a criticism which the testator could not rationally be supposed ever to have understood: and that here there was no reason for making such a dis- tinction, for that *Elizabeth* was heir at law, and had a right to the profits within the three years, (the debts and

Holt and
Tracy
25th Ja-
nuary,
1696, v.
2 Vern.
333, 3.
Cha. Ca.
129.

and legacies having been paid within that time.) Nor could, (as they contended) common sense warrant any such distinction; for that, in plain and honest meaning, the conditions are the same, whether they precede or follow the grant, and only shew the parties intention in what manner any particular thing should be complied with, as far as might be; and therefore insisted that the Lords should order, the trustees to convey the estate in question, to the use of *Elizabeth* for life, remainder to her sons by *Bertie* in tail male, remainders over as in the will provided, in case she could have married Lord *Guilford*.

The respondent insisted that it was not material through whose default it was that the marriage was not had, since, by the express proviso of the will, the appellant was not to have the estate in case the marriage did not take effect, and in default thereof the estate was to go over to Lord *Falkland*. And that no man could tell what will to make, or how to settle his estate by the last solemn act of his life, if a will, as this is, made advisedly, plain in the expression, and executed according to the laws and statutes for that purpose, should by surmise or construction, directly contrary to the express declaration of testator's intentions, be subverted: and that in that case not only the present Lord *Falkland*, but all devisees of estates would thereafter be precarious in the exposition of wills, be they never so plain, and as fully expressed as words can express; and that therefore the appeal ought to be dismissed.

There being contradictory accounts of the fate of this appeal, some books saying that the decree was reversed, and others that the business was ended by compromise, and some not speaking of any appeal, the fact is here stated from the Lords Journals.

33.
3 Ch. Ca.

Upon hearing council on both sides, the debate was adjourned, and all the Lords and also all the Judges summoned: and after again hearing council, this question was proposed; Whether the appellants shall have any relief in this cause? and resolved (several Lords protesting) in the affirmative. Then moved, that *Mrs. Bertie* may enjoy the estate for her life; and resolved that that was the relief the House would give the appellants, and that the decree be altered accordingly; and that the C. B. and *J. Nevil* prepare a draught of the judgment; 110.

1698. judgment; which was done, and follows, viz. After hearing council, &c. it is ORDERED and ADJUDGED that the trustees, Sir *William Whitlock* and *J. Grant*, and their heirs, do forthwith execute conveyances, whereby all the manors, &c. of said *John Cary*, devised to them, shall and may be assured unto or to the use of appellant *Elizabeth* for life, remainder to Lord Viscount *Falkland* and the heirs male of his body, with remainder to the right heirs of the said *John Cary* for ever. And that there shall not be any account of the profits of said premises for the time past, and that the goods of said *Mr. Cary* shall go and remain according to the directions of his will. And that so much and such part of said order of dismission of the appellants bill, and of the said decree on behalf of said Lord *Falkland*, as is contrary to or inconsistent with this judgment, shall be and is hereby reversed. Lord's Journ. Vol. xvi. 230. 236. 237. 238. 240. 241.

Elizabeth Lloyd, Widow, - - Appellant.

Martha Tym, Administratrix of } Respondents.
Robert Tym and *James Cardrow*, }

16th April, 1698.

Case 4.

APPELLANT was intitled to the lands in question (copyhold) worth 120*l.* per ann. as heir to her father *William Bevan*, who had mortgaged part for 160*l.* and she and her last husband *Lloyd* had since made five several mortgages for 630*l.* which, with interest, amounted to about 800*l.* and she stated that her said husband had been, unknown to her, supplied with small sums on excessive brokerage by *Robert Tym*; who, with her husband, often pressed her to take up 1000*l.* on her estate from respondent *Cardrow* at 5 per cent. on pretence to pay off the mortgages which were at 6 per cent. and appellant consented, if the mortgages should be paid off. *Cardrow*, who knew of the mortgages, and that the estate was her's, agreed to lend the money. *Tym* inspected the title, and she and her husband surrendered

rendered to *Cardrow* in fee; her husband having previously promised in writing that the 800*l.* should be paid to her to discharge the mortgages; but *Cardrow*, after nine months treaty, objected to the title, and broke off, having got 20 guineas for his money being useless. And then *Lloyd* and *Tym* pretended that *Tym* would lend the 1000*l.* and pressed her to join in a security, which she agreed to, on being promised 800*l.* to pay off the mortgages; and they privately prepared a lease for 99 years to *Tym*, for securing the money, with a covenant to surrender to him in fee; and sent for her to a tavern, and there pressed her to execute it, which, (seeing no money) she refused; but afterwards, by menace and persuasion that the 800*l.* should be paid her, executed the lease, and also a receipt for the 1000*l.* and at this time the whole money due to *Tym* was alleged to be but 450*l.* but afterwards, as alleged, he lent *Lloyd* more money; and, by their accounts, *Tym*'s debt increased to 767*l.* 10*s.* 8*d.* being principally procuration and continuance money. She soon after called on *Tym* for the 800*l.* which he refused to give her any part of; but *Lloyd* and he prevailed on *Cardrow*, who knew himself to be her trustee, to declare the surrender to him in trust for *Tym*, without her privity, though he, *Cardrow*, knew of those practices, and had before executed a letter of attorney to surrender to appellant and her husband, and to her heirs; and which letter of attorney *Tym* or *Lloyd* afterwards got. And the husband further prevailed on appellants two daughters, unknown to her, to become bound with him for 140*l.* to be procured by *Tym*, (who paid only 50*l.*) When appellant knew it, she pressed him to disengage them, he refused unless she joined to secure the 140*l.* to *Tym*; she consented: and they had her to a tavern, where she signed an indentment on the lease, persuaded it was to secure the 140*l.* to *Tym*; but afterwards discovered it was to declare that the premises should stand charged with the 1000*l.* and with 254*l.* 13*s.* 2*d.* pretended to be due on a further account from her husband to *Tym*; and the husband died in about two months after, and *Tym* (*Hill*, 1691.) brought an ejectment in *Cardrow*'s name, and got into possession, and soon after died, and the respondent since had the possession. And as soon as appellant discovered these frauds, she preferred her bill in Chancery, and respondent filed a cross bill; and in *May*, 1694, the causes were heard before the Master of the Rolls, who declared

1698.

declared it the grossest fraud ever brought before the Court; but could not relieve, as appellant had signed the indorsement; but decreed an account, and appellant to pay respondent so much only of the 1000*l.* and 254*l.* 13*s.* 2*d.* as *Tym* really paid *Lloyd*, with interest on each payment, and that the premisses should be charged therewith; and upon payment, *Cardrow* to surrender to appellant, and in default of payment by appellant, *Cardrow* to surrender to respondent and her heirs, and this without costs. And respondent got this decree enrolled so suddenly that there was no opportunity of appealing to the Chancellor; but appellant brought a bill of review, a demurrer to which was allowed, because the error did not appear on the face of the decree, and from the whole appellant now appealed, and insisted that the surrender to *Cardrow* was manifestly intended for 1000*l.* to be lent by him, and that 800*l.* thereof was to go to pay the former mortgages; and *Cardrow* not paying any part, and being privy to the proceedings, the surrender to him ought to be deemed a trust for the appellant. And that *Cardrow* declaring it a trust for *Tym*, without her privy, was a fraud and breach of trust. And that her indorsement on the lease to *Tym*, and that lease itself, were obtained by fraud, on a promise to discharge the 800*l.* mortgage debt, which was not done; and so her estate, loaded with 1800*l.* instead of 800*l.* and that she was then not only a *feme covert*, but no wife privy to *Cardrow*'s declaration, nor to the contents of the indorsement.

The respondent made this case: that appellant's husband applied to *Tym*, a scrivener, to borrow 1000*l.* which *Cardrow*, his client, agreed to lend. And that *Cardrow* filed a bill against appellant and her husband to discover incumbrances, and that they on oath denied any, except three mortgages, and a surrender to uses to be declared by appellant's deed; and thereupon the surrender to *Cardrow* was made, and that *Cardrow*'s not completing his purchase was occasioned by appellant and her husband. And that *Tym*, in expectation of the loan, lent the appellant's husband and her daughters several sums, and became bail for him, and paid the debt; in all above 500*l.* and undertook to advance the remainder of the 1000*l.* and thereupon appellant and husband made the lease to *Tym*, and he, the husband, covenanted that he and appellant would surrender

to

to *Tym*, and *Tym* covenanted to reconvey on payment of the 1000*l.* and interest. Afterwards *Tym* and the husband accounted; and he signed the account, and acknowledged that 767*l.* 10*s.* was paid in part of the 1000*l.* and *Cardrow*, a year and a half after the lease, declared the surrender to be in trust for *Tym*. And *Tym* and the husband accounted again afterwards, and 1044*l.* then appeared to be paid, and the husband signed that account also; and also a third account, which shewed 254*l.* 13*s.* 2*d.* paid by *Tym* above the 1000*l.* and by an indorsement on the lease, a year and half after *Cardrow*'s declaration of the trust, appellant and her husband agreed the premises should be security for both; and the indorsement was previously read, and appellant signed it without objection. And that in the 1254*l.* 13*s.* 2*d.* only 45*l.* 13*s.* was allowed for scrivener's fees, and all the rest money paid to appellant, her daughters and husband; and that this was not *Tym*'s money, but borrowed and secured by him. And that appellant, after her husband and *Tym*'s death, filed her bill; but distrusting her own equity, set up a title in her daughters, not disclosed by her answer to *Cardrow*'s bill; and under colour of such title, ejectments were twice delivered but not proceeded on; and that in the decree, respondents had not any allowance for scrivener's fees, nor for any sum not actually proved paid. And this decree appellant thought so favourable, that she acquiesced, and proceeded before the Master for near three years, and the Master reported 1086*l.* 4*s.* actually paid. And then appellant absconded, and after some compulsory proceedings, petitioned for two months to look into the report; and then filed frivolous exceptions; and whilst these stood in the paper for argument, filed a bill of review, which was dismissed by the Chancellor. And then appellant petitioned to set down the exceptions, which was ordered; and then on hearing were over-ruled, appellant not appearing to argue them. And when the Master's report must have been confirmed, as of course, appellant brought the present appeal, which on these circumstances respondent insisted ought to be dismissed with costs.

And, after hearing council on both sides, it was Lords ORDERED and ADJUDGED by the Lords, that the Journ. petition and appeal should be dismissed, and the decree vol. xvi. of the Court of Chancery affirmed.

p. 265.
The

1698.

The Dean and Chapter of *Durham*, } Appellants.
 - and *Samuel Shepheard*, their Lessee, }

The Member and Burgeses of } Respondents.
Newcastle upon Tyne, }

Case 5.

THE appellant stated, that the Dean and Chapter were seized of the Manor of *Weslow*, in the county of *Durham*, on the South side of the river *Tine*, extending to the middle of that river, and of the East part of a certain waste ground called *Farrowlake*, about 150 acres, (parcel of the manor) with divers liberties in the said river, and demised to the appellant *Shepheard* their said East part of *Farrowlake*, with power to convert it to his best advantage; and this *Farrowlake* being useless by the water overflowing it at every tide, which was thereby hindered from flowing up the river; and the appellant *Shepheard* conceiving it a fit place for erecting salt-works, began to inclose it with a ballast wharf, for salt ships, according to the antient usage at *South Shields*, (within said manor) where they had, time out of mind, enjoyed such wharfs, without paying any acknowledgment to respondents, and particularly at a place called *Mildam Key*, where they had constantly taken the ballast of salt ships, for above three score years, without interruption; and that this place was many years ago certified by commissioners of sewers, as most commodious for a ballast key, and its advantages were reported to King *Charles* the second, by the Trinity Masters of *London*; and this liberty was confirmed to appellants by several orders of the King and Council, in the case of Sir *Robert Heath*, above three score years ago: Yet respondents have, for many years, endeavoured either to get this ground themselves, or render it useless to all others; and fearing that coal ships should prefer to unload ballast at the intended quay, rather than sail many miles up a dangerous river to the town quays, not only demolished the said wharf, but exhibited their bill in the Exchequer, prescribing for the sole licensing all ballast

See all these proceedings here referred to, subjoined to this report.

ballast wharfs there; and praying a perpetual injunction to restrain appellants in the premises. Whereupon the Court directed a trial upon these issues: 1. Whether the appellants could lawfully erect and use a ballast key at *Farrowslake*, without the respondents license. 2. Whether the erecting such quay would be a damage to the river or navigation thereof, or port of *Newcastle*. And upon a verdict by a jury of *Bedfordshire*, an inland county, strangers to navigation, who never had any view or knowledge of the place in question, the Court, without granting appellants further time to make out their right at law, by a jury of the neighbourhood, which they assert they can do by evidence never yet heard, (and some of it discovered since the last trial) decreed a perpetual injunction: from which the defendants appealed, and insisted before the Lords, that the issues tried, (supposing them proper) were not tried by a jury of the neighbourhood, before whom the law gives every man right to have his cause once tried at least, as having best knowledge of usage and fact, and that such trial ought the rather to have been granted in this case; because it concerns not only the inheritance of the Church, and the private interest of their lessee fairly purchased, but the coal and salt trades throughout the kingdom; and that no damage was proved to have arisen to the said river or port by the appellants ballast wharf, wherein they proceeded above seven score yards, or by the old wharf, built formerly at the same place, which had stood fifty years without pretence of prejudice: which appellants conceived would have been the proper issue, rather than an issue to try whether it will in future be any damage, which no jury can well take cognizance of, it being impossible to prove how much or how the appellants would build, till the same should be completed; and insisted further, that appellants, by this decree, are not only restrained from erecting ballast wharfs for coal ships, but for salt ships too, though it was fully proved that salt ships constantly cast their ballast at the Dean and Chapter's key, at *Smith Shields*, without any duty or acknowledgment to the town of *Newcastle*: to which, in particular, the appellants right could not possibly be found, upon so general issue as was then tried. And that appellants are, by this decree, for ever precluded from making any use of their own ground, and the Church for ever disabled to make

1698. { make leases of *Yarrowlake*, as they have done for many years, and incapable either of hindering the tides overflowing more of their ground, or preventing damages to the port and haven, by the waters overflowing *Yarrowlake*, which must be whilst it lies uninclosed, and this upon one single trial by a foreign jury: and though the respondents may insist upon another trial, had about twenty years since, yet the same was upon a different case, and between other persons, and appellants no parties, and by a *Buckingham* jury, wholly unacquainted with the place. And appellants further insisted, that this verdict would be an evidence, not only against the appellants right to the erection and usage of ballast wharfs for salt ships at any time hereafter, in any other part of their said manor, but also against the ancient undoubted right and present usage at *Mildam Key*, and other places already built within the manor; so that salt ships must either pay duty to the respondents, or sail many miles up the river to the town keys, to the great discouragements of the salt trade at *Shields*, and prejudice of the Church's interest; and that appellants right could not, nor ever can be, determined upon this bill and proceedings in the Exchequer; and that this decree wholly deprives appellants from all possibility of recovering, and even from trying their right; and the corporation of *Newcastle* hath a very great revenue, and a sufficient recompence for preserving this port, by impositions and customs on goods and merchandizes imported and exported.

The Respondents made this Case: That they are an ancient corporation, and have held the Town of *Newcastle*, the port and haven there, from a place in the sea called *Sparrowhawk*, to a place in the river *Tyne* called *Hedwynstreans*, and have the conservatorship of the river; the sole power of erecting and licensing ballast shores and keys thereon, and holding a Court of Record for the Conservation thereof, before the Mayor and some of the Aldermen, time out of mind; and that such privileges have been confirmed to the Corporation by divers ancient grants from the Crown, under the yearly fee farm rent of 100*l*.

That never any ballast shore or key, though not prejudicial to the river, navigation and trade, was erected

ed on the said river of *Tyne*, without the license of the said Corporation.

That about 30 years ago, Sir *Charles Adderley* and *John Crooke*, Esq. tenants under the then Dean and Chapter of *Durham*, of a great piece of ground called *Farrowlake*, (the place in question) attempted to build a ballast sewer or key, but were obstructed by the Corporation, as it would endanger the navigation of the said river, be mischievous to the bar of *Tinmouth*, dangerous to ships and mens lives, and destructive to trade; and thereupon *Adderley* and *Crooke*, as also the said Corporation, petitioned his late Majesty, King *Charles the second*, in Council; and after hearings at the Council Board, it was ordered in Council that a trial should be had at the Exchequer bar, by a special jury of the county of *Bucks*, upon this issue, viz. whether the Dean and Chapter of *Durham* could lawfully erect and use ballast keys, and wharfs, at *Farrowlake*, without the license of the Mayor and Burgeses of *Newcastle*? and in Easter Term, 1669, a trial was accordingly had before the late Lord Chief Baron *Hale* upon the said issue, wherein *William Blackett*, Esq. (on the behalf of the said Corporation) was plaintiff, and the said *Crooke* (on the part of the then Dean and Chapter) was defendant; and after a long trial and full evidence given on both sides, the jury gave a verdict, viz. that a ballast key could not lawfully be erected and used at *Farrowlake*, without the license of the Mayor and Burgeses of *Newcastle*. Not satisfied with which trial, *Adderley* and *Crooke* again petitioned the King and Council, that it might be referred to the Lord Mayor and Court of Aldermen of the city of *London*, to examine and report concerning the alleged public utility of such ballast wharf, which was accordingly ordered; and 27th *October*, 1670, the then Lord Mayor and Court of Aldermen made their report to his said Majesty in Council, and certified that, having heard council and examined witnesses on both sides, they found that the erecting a ballast sewer at *Farrowlake* aforesaid, would prove destructive to trade in general, dangerous both to shipping, and mens lives, would enhance the price of sea coals, obstruct and choak the river *Tyne*, be exceedingly mischievous to the bar of *Tinmouth*, and manifestly tend to the decrease of the trade, and damage of the town of *Newcastle*; under which trial and report all persons rested satisfied for above 20 years, until 1691, when

1698.

1698. { when the appellant *Shepherd* obtained a lease from the Dean and Chapter, of *Jarrowlake* aforesaid, for twenty-one years, at some very small rent, and soon after attempted to build a ballast sewer, or key, there; which was presented as a nuisance to the river, and ordered to be demolished and abated, and was accordingly done; and in Trinity Term, 1694, respondents exhibited their bill in the Exchequer, stating their right, and the necessary prejudice of any ballast sewer, or key, to be erected upon the said river of *Tyne*, and therefore prayed an injunction, to prohibit the appellants, and all claiming under them, from erecting such ballast sewer, or key, at *Jarrowlake*; which bill the appellants answered; and several witnesses were examined on both sides by commission, and before a Baron in *London*; and the appellants joined in the commission, and their commissioners were present when all respondents witnesses were examined, and cros examined them, and exhibited interrogatories before the commissioners, and exhibited several witnesses on their part; and appellants having discovered what respondents witnesses had sworn, appellants about two months after exhibited other interrogatories before a Baron in *London*, differing in many material points from their interrogatories exhibited before the Commissioners; which appearing to the court, it was ordered, that oath should be made by the appellants, or some on their behalf, what witnesses examined before a Baron in *London* were dead, and the court would consider, at the hearing of the cause, whether their Deposition should be made use of or not: And that the Depositions taken on any interrogatories, varying from the interrogatories exhibited before the commissioners, should be suppressed: And 19th *February*, 1696, the cause was heard, and the prejudice of this ballast wharf appeared so plain to the court, that a perpetual injunction would have been at once decreed, but that the appellants importuned the court for a trial at law, with which (as they alleged) they would rest satisfied; and thereupon the court directed a trial at bar by a special jury of *Bedford*, upon the two issues, stated by appellants; and in Trinity Term, 1697, a trial was accordingly had, which continued about 16 hours; and upon a full evidence on both sides, a verdict was found for the respondents upon both the said issues; and on the 10th of *February* last, it was finally ordered and decreed by the said Court of Exchequer, that the appellants, and every of

of them, should be restrained from making or erecting any ballast key or wharf at *Farrowgate* aforesaid; and that a perpetual injunction should be awarded as prayed; and the appellants, as a ground for the present appeal, pretend that the depositions taken in *London* were suppressed, and that the witnesses who made those depositions were, before the said trial, unfortunately drowned, whereby the appellants could not make their defence: But the respondents insist, that if the appellants had been aggrieved by the said order for suppressing the said depositions, they should have appealed to the Lords before the trial of the said cause; and that having omitted to do so, they ought not now to be heard against that order; which, however is just and reasonable, and according to the rules and practice of the courts of law and equity: Wherefore, and in regard the said decree is only to quiet the respondents in the enjoyment of a right which they hold by custom, and to hinder the appellants from erecting a nuisance to the destruction of a navigable river; and that the said custom and nuisance had been tried by two solemn trials at the bar, the respondents insisted that the decree should be affirmed, and the said appeal dismissed with costs.

And (*Die Sabbati, 7^o Maii, 1698,*) after hearing council on both sides, that it was ORDERED and ADJUDGED by the Lords, that the petition and appeal should be dismissed, and the order and decree appealed from affirmed. *Lords Journ.* vol. xvi. p. 278.

*The Proceedings referred to in the foregoing Case
here follow:*

At a council held at *Greenwich*, 1st June, 1634, order of present the King's most excellent Majesty: Upon consideration of a complaint of the Mayor and Burgeses of *Newcastle*, against the ballast shoar lately built by Sir *Robert Heath*, Knight, Lord Chief Justice of the Common pleas, at *South Shields*, upon the river *Tyne*, pretending same to be to the great prejudice of shipping and navigation, and to the annoyance and damage of the river, and on hearing the allegations on both sides, with their council

1698. { council learned, it was ORDERED that the said
shear should be finished, and backed with ballast, to make
it fit for the salt works, which for his Majesty's service
are begun, and intended to be perfected there: In the first
place, that the seamen shall have liberty freely to cast
their ballast without interruption, if they find it conve-
nient for them, none being compelled to it, nor hinder-
ed from it; that neither those of the town of *Newcastle*,
nor the ostemen, do hinder the same indirectly, by de-
nying or unnecessarily delaying to carry down coals by
keels to the ships, which shall cast their ballast at
Shields; that to the end this shore, which may be for
the safety and encouragement of navigation and shipping,
may be so used, as the same may neither be prejudicial
to the town, in diverting or withdrawing of trade from
thence, nor to his Majesty in his customs and duties, nor
hurtful to the river, his Majesty will reserve the order-
ing thereof to himself as well in the particulars aforesaid
as in all other things thereunto appertaining; in such sort
as both the town and the seamen shall find his Ma-
jesty's Royal care over them.

Certificate of Sewers. *September 2d, 1759.* In pursuance of an order of
sewers, dated 22d *August* last, we whose names are
subscribed, six of the Commissioners, (five of the quorum)
have viewed the river *Tyne* from *Tinmouth* bar to the
town of *Newcastle*, as far as *Newborne* up the river,
and all the banks, staithes, ballast shores, wharfs,
creeks, and other places within the confines of the said
river, and do find the part of *Farrowlake* adjoining
to the *South Shields*, and belonging to *Thomas Liddell*,
of *Ravensthorpe*, Esquire, where a ballast shore is al-
ready begun, to be a very fit commodious place, having a
found and firm foundation, whereon to build and erect
a ballast shore for ships of great burden to cast ballast
there, provided that the ragged stones lying before the
same be removed and taken away, that ships may lie there
with safety.

Report of the Trinity Masters. According to your Majesty's order of 5th *August*, we
have considered the allegations of Sir *Charles Adderly*,
Knight, and *John Crook*, Esquire, concerning erecting a
ballast shore at *Farrowlake*, near *South Shields*, in
the

the county of *Duresme*, and are of opinion, that a ballast wharf at *South Shields*, will be of great use and benefit to all ships trading in the river *Tyne* for coals; for, it will prevent loss of ships in coming from *Finnish* bar, for that they cast out great part of their ballast before they come to the bar to avoid the charge of keeling it up to *Newcastle*, and are afterwards often cast away by reason of their lightness, and other damage it will prevent to ships, and give them quicker dispatch in their voyages—it will encourage the building of great ships, more proper for that trade than smaller vessels—it will encourage navigation, by reducing the price of taking out the ballast—and masters may thereby make two or three more voyages in a year, charge and time being lessened, and it will tend to reduce the price of Coals.

Signed by the master and wardens,

Sir Cornwall Bradshaw, Knight, - Appellant.

William Sutton, Gentleman, - Respondent.

THE appellant shewed that *John*, Earl of *Clare*, Case 6. now Duke of *Newcastle*, and *John White*, executor of *Gilbert*, late Earl of *Clare*, had theretofore brought their bill in Chancery against appellant, *William Bridges*, *Andrew Card*, and others, charging that the said late Earl *Gilbert*, 5th of *March*, 1682, by article of agreement, in consideration of 617*l.* 10*s.* covenanted with *John Hynd*, that the Earl would, 25th *March*, 1684, lease to *Hynd*, or his assigns, several messuages, shops, stables, buildings, and hereditaments, in or near *Claremarket*, *Clement's Danes*, *Middlesex*, then in possession of several persons named, for 61 years, from 25th *March*, 1683, at a peppercorn rent for the first year, and 25*ol.* *per. ann.* rent for the residue of the term, to build houses and shops upon; and agreed that when the houses should be second floor high, and the shops finished, he would, at *Hynd's* request and cost, lease each house and shop to such person or persons as *Hynd* should name, for 61 years, from the 25th of *March*, 1683, and reserve a yearly rent on each house and shop not

not less than thirty, nor more than forty shillings a foot; and that when 25*ol. per ann.* should be thereby ascertained, the Earl and his heirs should lease the residue of the premises to *Hynd* for 61 years, at a peppercorn rent; and for that purpose the said Earl was to let the Premises to *Gard*, and to *George Cawdron*, since deceased, for sixty-two years from the said 25th of *March*, in trust to make such lease; and that accordingly, 5th *March*, 1682, Earl *Gilbert* demised the premises to *Card*, and *Cawdron*, upon the trusts aforesaid; and further agreed, that *Hynd* and his assigns might have the benefit of a lease made to the Earl, for a free passage from *Lincoln's-Inn Fields*, to *Playhouse-Alley*, paying the rent reserved thereby: and further charging, that Earl *Gilbert*, 16th *January*, 1688, made his will, and *White* his executor in trust for the Duke: And that the appellant, 16th *October*, 1688, had become bound with *Hynd*, in a great sum to Serjeant *West*, and *Jane Kingdon*; and that, for further securing 300*ol.* part thereof, with interest, *Hynd*, 28th *May*, 1685, had mortgaged all his interest in the premises to the lady *Pye*, conditioned to pay her the said 300*ol.* with interest, in *August* following; and that *Hynde* afterwards became bankrupt, and the commissioners assigned all his interest in the premises to *John Brown*, and *Thomas Sands*; and further charging, that the appellant and *Bridges*, pretended some interest in the premises, under some extent or assignment of the lady *Pye*, and that *Hynd* and his assigns had not performed the articles and agreement on their parts; and appellant further shewed, that the Duke and *White* had, by their said bill, prayed that the arrears of rent might be paid, and the trust performed, or the premises reconveyed free of all incumbrances to the Duke and his heirs.

The appellant, and *Whitlock Bullstrode*, thereupon brought their bill in Chancery, against the now Duke of *Newcastle*, (then Lord *Clare*)—*White* and *Card* charging, that *Bullstrode* had paid Lady *Pye*, by order of the Court of Chancery, 300*ol.* and interest, and taken up the said bonds, and also taken an assignment of her security in trust for the appellant. That *Hynd* had performed his said articles, and laid out above 500*ol.* in building, and paid his fine, and great part of the ground rent, and had let the houses and shops, when built, for 55*l.* 10*s.* per annum; but that the tenants were disturbed by the said Earl's entries, and forbidding the

1698.

the shops to be used as shops, and also forbidding the tenants to pay their rents to any but him or his agents; whereby the tenants were driven away, and the houses and shop rents fell above one-half. And appellants and *Bulstrode*, by their bill, prayed, that the articles might be performed, and the houses and shops enjoyed accordingly, and they allowed the losses sustained by the Earl's conduct. And both cases being at hearings, 1st February, 1691, the Court of Chancery decreed, (*inter alia*) That it should be referred to a Master, to examine and certify what rent had been paid, and what remained in arrear of the 25*ol. per annum*, and of 44*l. per Annum*, for the rent of the said passage; and when the houses and shops were built and finished, and to whom and how let; and that the leases of the premises should commence from *Lady-day*, 1683, and that appellant and his assigns should hold and enjoy all houses and buildings on the premises, in such manner as occupied since the building thereof; and that the ground rent should be apportioned on such of the houses and premises, as should be sufficient to pay the same. And, 21st June, 1693, Sir *Miles Cook*, Knight, the Master reported, (*inter alia*) That the houses were built and finished by *Hynd*, in 1684; that there was due to Earl *John*, the now Duke, and *White*, at *Lady-day*, 1693, 1827*l.* 10*s.* for nine years ground rent, above 422*l.* 10*s.* paid to their agents, and for ten years rent of the passage, 140*l.* and that the houses and shops were let by *Hynd's* agent, at 558*l.* 10*s.* *per annum*; and that appellant and *Bridges* had, by letter of attorney, 5th of May, 1688, authorized *Hill* to receive the rent to their use. And 25th July, 1693, the Court of Chancery over-ruled several exceptions to the report, and decreed, that appellant and *Bridges* should stand in *Hynd's* place, and pay the arrears of rent, amounting to 1967*l.* 10*s.* and take leases of the houses according to the articles, and referred it to the Master to settle the same: But on a rehearing, 18th November, 1693, the Court declared, that appellant alone ought to stand in *Hynd's* place, and *Bridges* to be charged only with the arrears incurred since he joined appellant in the letter of attorney to *Hill*, and be from thenceforth discharged of the accruing rent; he, in Court, so desiring, and waving all right to the premises.

Appellant,

1698. Appellant, 14th December, 1693, sold his interest in the premises to *Sutton*, who was privy to the decrees, and covenanted to assign to him all his estate therein, at, or before the 25th of February following; and to procure *Card* to execute such lease and leases, as *Card* was enabled, directed, or ought to make unto *Hynd* or appellant. And *Sutton* covenanted to indemnify appellant from all ground rent, &c. from and after *Christmas*, 1693; and under these articles *Sutton* was let into possession of the premises, then let at 300*l. per ann.* and received rents ever since; but in breach of his covenant with appellant, never paid one penny of the ground rent incurred since *Christmas*, 1693. And soon after the execution of these articles, *Card*, by order of the appellant and *Sutton*, made a draught of a lease of the said premises to *Sutton*, whereby the ground rent of 250*l. per ann.* was to issue out of the whole; which draught was perused and settled by council, and agreed to by *Sutton*, who ordered *Card* to engross a lease pursuant thereto; but afterwards *Sutton* insisted to have distinct leases, and would not accept of a lease according to the said draught: But in *Hillary* term, 1694, exhibited his bill against appellant in the Exchequer, to compel an execution of the said articles in specie, and that appellant should procure *Card* to make him twenty distinct leases; but before the appellant was required to answer that bill, *Sutton* prevailed on him to attend a Master in Chancery, and see if the rents could be apportioned according to the decree of that Court; and *Sutton* produced a rental amounting to 275*l. per ann.* and the Duke and his agents insisting, the premises let were not sufficient for an apportionment. The Master certified that matter to the Court, and prayed further direction; and the Court, hearing council in the presence of *Sutton* and his council, July 16th, 1695, declared, that all the premises ought to be subject to the said ground rent, and so ordered. After which, *Sutton* required an answer to his said bill, which the appellant put in in *Michaelsmas* term following, and thereby set forth the proceedings in Chancery, and that he was ready to perform the agreement on his part, so far as he was empowered by the said decree and order, but could not procure distinct leases of each shop and house. And 26th October, 1696, the Court of Exchequer, upon hearing the said cause, decreed appellant to perform his articles with *Sutton*, in specie, with reference to the words in the articles, (unless cause) that

that day fortnight; and 12th November following, confirmed their decree; and further, ordered a feigned action to be brought against the appellant as upon a *quodam dampnificatus*, to ascertain what damage *Sutton* had sustained by appellant's not performing his articles for the time past; upon trial whereof, *Sutton* recovered 100*l.* damages against the appellant, although *Sutton* had quietly enjoyed the premises, and received the rents, from the time of his agreement, without interruption, or paying any of the ground rent. And 19th December, 1696, the Court of Exchequer referred it to Mr. Baron *Blencow*, to settle the leases to be granted by *Card*; and the Baron, notwithstanding the decree and order of Chancery, declared it his opinion, that the ground rent ought to be apportioned, and that *Card* ought to grant distinct leases, and having approved a draught of the leases to be made by *Card*, issued several summonses for *Sutton* to attend him, with an account of the names of the several tenants, and a particular rental, in order to apportion the rents thereof. And 20th February, 1696, appellant, in obedience to the decree of the Exchequer, assigned all his interest to *Sutton*, though *Sutton* had not executed a counter part; but, without attending the Baron, according to the summons, moved the Court of Exchequer against the appellant, for an attachment for contempt, in not performing the decree of that Court, in procuring *Card* to execute several leases at apportioned rents; and the 7th December, 1697, obtained an order for an attachment, upon which the appellant appeared, and was examined on interrogatories, and acquitted of the contempt, inasmuch as the lease directed by the Baron, was not perfected by inserting the apportionment; and the Duke afterwards prosecuting appellant for the arrears since *Chrissmas*, 1693, which *Sutton* ought to pay, and *Sutton* being in possession, and a prisoner in the King's Bench, in execution, (but not at the appellant's suit); appellant, in *Michaelmas* term, 1696, brought his bill in Chancery against his Grace, *Card*, and *Sutton*, to oblige the Duke to accept *Sutton* tenant, and to enforce *Sutton* to pay the arrears since *Chrissmas*, 1693, and *Card* to make such lease as he ought to do by the decree of that Court, which appellant was advised to do, in regard that Court had the priority of suit, and the Duke and *Card* were not parties to *Sutton's* bill in the Exchequer; and the Exchequer having enjoined the appellant not to proceed in Chancery against *Sutton*,

on

on pretence the Exchequer had the priority of suit, appellant exhibited his bill in the Exchequer, against the Duke, *Card*, and *Sutton*, to the same effect; and thereupon the Chancery enjoined the appellant not to proceed against *Card* in the Exchequer, for that the Chancery had the priority of suit. By which proceeding, the appellant was utterly deprived of remedy under either decree.

But the appellant is advised, that he can have no relief against the decrees and orders of Chancery, and that the decrees and orders of the Court of Exchequer, ought to have been agreeable thereto, in regard the said proceedings in Chancery were prior; and that *Sutton*, coming in *pendente lite*, was privy to all those proceedings, and bound thereby, and ought to have brought his suit in that Court, and not in the Exchequer; and submitted to the Lords dismission of so much of his appeals as concerned the decree, order and proceedings in Chancery, and that these proceedings should be affirmed: Wherefore, and for that, appellant was, by his articles, only obliged to procure *Card* to grant *Sutton* such lease or leases as the Court of Chancery enabled him, appellant conceived, that the Exchequer having ordered him to procure *Card* to make several leases to *Sutton*, at apportioned rents, such order ought to be reversed, as contradictory to the proceedings in Chancery, and the Lords affirmation thereof; and that *Sutton* ought not to have any lease until he hath paid the arrears of the said ground rent, incurred since *Christmas*, 1693: and therefore appealed from the decrees and orders of the Exchequer, and prayed they might be reversed, and to be generally relieved in the premises.

Francis
Browne.
T. Newport.

The respondent made this case: That appellant and he, 14th *December*, 1693, entered into and sealed articles concerning respondents purchasing from appellant several houses and buildings in *Bear-Yard*, and thereby *Sir Cornswall*, in consideration of 1100*l.* paid and secured by a mortgage of *Sutton*'s estate in *Surry*, covenanted that he would, at or before the 15th of *February* then next, by indenture, assign and set over to *Sutton* all said premises, and all his estate therein, free from incumbrances, and ground rent, to *Christmas* following, with reference, and according to certain articles, dated 5th *March*, 1682, between *Gilbert*, late Earl of *Clare*, and

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1698.

John Hynd; and also to a lease of the same date, between the said Earl and *Hynd*, and *Cowdron* and *Andrew Card*. And *Sir Cornwall* thereby further covenanted, that he would, at or before said 15th day of *February*, procure *Card* to execute to *Sutton* such demise and demises, for such term or terms as by said articles, lease, and a decree in Chancery, dated 1st *February*, 1691, is enabled and directed to make; and that *Sutton* thereupon took possession; and, in confidence of *Bradshaw's* performing his agreement, laid out above 2000*l.* in repairing the premises, and making a convenient passage thereunto; and that *Bradshaw*, from *December*, 1693, till *Hilary* term, 1694, declining to make him a title in the premises, *Sutton* in that term brought his bill in the Exchequer for a specific performance of the articles; and that appellant had, in his answer, confessed the agreement, and set out a decree in Chancery between the Duke of *Newcastle* and himself, whereby leases were to be made according to *Hynd's* articles; and that the ground rent should be apportioned. And 26th *June*, 1696, the cause was heard in the Exchequer, and, after a long hearing, it was referred to two gentlemen to arbitrate the matter; and the cause to stand in the paper for the 26th *October* following. And respondents counsel then informing the Court that the referees could not determine the matter, prayed judgment in the cause; and no council attending for *Sir Cornwall*, it was decreed, that *Sir Cornwall* should perform his said articles, in specie, literally according to his covenant, unless cause that day fortnight; and then the decree was confirmed, and an issue directed as stated by appellant. And now appellant, by his appeal, endeavours to reverse the said decree, and avoid his own agreement, and to keep *Sutton's* money in his pocket for nothing; and objects that he cannot perform his own agreement, and that *Sutton* is become the Duke's tenant, and that his Grace promised to lease the premises to him; but the respondent submitted, that the first objection is strange in a court of equity; and if it should be received for doctrine and good equity, that a person shall take my money to cause and procure a third person, his trustee, to convey an estate to me; and then shall tell me he cannot prevail upon him to do it, and yet will not restore me my money, or put me in the same condition he found me: It would encourage all manner of fraud and oppression of that nature, and few

few men would be safe under any agreement; especially considering Sir *Cornwall* was of full age, knew what he did, and doth not pretend he was imposed upon by *Sutton*. And as to the second objection, there is no such matter proved in the cause; and, in truth, there is no such thing; neither did the Duke ever accept respondent his tenant, nor promise to make him any lease, but always opposed it, and refused it. And the decree and proceedings in Chancery are not grounded on the articles between Sir *Corpswall* and *Sutton*, and *Sutton* is no party to that suit; and, respondent conceived, no man can be bound by a decree who is not a party to it; and insisted that the decrees, orders, and proceedings in the Court of Exchequer, were agreeable to justice, equity, and good conscience; and that the appeal ought to be dismissed with exemplary costs, and the rather, because appellant, during his proceedings in equity against *Sutton*, prosecuted *Sutton* at common law upon the said agreement, and laid him in gaol for 300*l.* and that *Sutton* is now actually a prisoner at his suit for the same; and during *Sutton*'s confinement Sir *Cornwall* foreclosed *Sutton* of the equity of redemption of the mortgaged estate, which Sir *Cornwall* had for the security of his 1100*l.* and is now in the actual possession thereof, and hath been so, and received the rents and profits thereof, about 200*l.* a year, from 1693, the time of his articles with *Sutton*.

Edm.
Bridges.
J. Daniel.

15th April, 1698, Sir *Cornwall Bradshaw* presented to the Lords his petition of appeal from two decrees of the Court of Chancery, one in a cause between *John*, Earl of *Clare*, (then Duke of *Newcastle*) and *John White*, plaintiffs, *Bradshaw*, *Brydges*, *Card*, and others, defendants; and one in a cause between *Bullstrode* and *Bradshaw*, plaintiffs, the *Duke, White*, and *Card*, defendants; and also from a decree and several orders of the Court of Exchequer, in a cause between *Sutton*, plaintiff, and *Bradshaw*, and others, defendants. And 17th May, 1698, Sir *Cornwall Bradshaw* presented a further petition to the Lords, praying that his said petition and appeal might be dismissed, as to so much of it as related to the said decrees, orders, and proceedings, had and made in the Court of Chancery; and that the said decrees, orders, and proceedings might be affirmed, which was ordered accordingly. And, *Die Lune* 6^o Junii, 1698, upon hearing council upon the petition and

and appeal from the Exchequer decree: It was ORDERED and ADJUDGED by the Lords, that the said decree and orders of the Court of Exchequer do stand affirmed with this alteration, "That the said Sir Cornwall Bradshaw do procure the said *Andrew Card*, " upon the said *Sutton*'s performing what by the articles " mentioned in the said decree he is obliged to perform, " to execute one or more leases for such term and estate " as the said *Andrew Card*, by the said articles and the " decree, and orders made in the Court of Chancery, " (as they now stand affirmed by this House) is enabled and ought to do, and no otherwise." *Lords Journ.* vol. xvi. 264. 288. 301.

Thomas Tisley and *Anne Pottenger*, - Appellants.

Angelott Wright, - - Respondent.

THE appellants made this case: That *Richard Tisley*, Case 7. of *London*, Merchant, by his will, made in *December*, 1675, bequeathed all his personal estate (except some few legacies) to appellant *Anne*, his then wife, and appellant *Thomas* his son, and *Elizabeth Tisley*, his daughter (since deceased) and made his cousin, *John Tisley*, and others his partners, executors in trust, for his wife and children, and died in *October*, 1677, leaving a sum of 113*l.* 10*s.* 9*d.* ready money, in his dwelling house in *Coleman-Street*, and a far greater sum in bags, in his warehouse in *Welch Hall*, under *Guildhall*, besides a large stock in trade; and the executor, *John Tisley*, immediately took the ready money found in testator's dwelling house into his possession; and the bags found in *Welch Hall* were removed to *Christ's Hospital* by the president and governors thereof, landlords of *Welch Hall*, in *usum jus habentis*; and 13th *November*, 1677, an inventory was taken of testator's estate, intituled an inventory of his goods, chattles, &c. seen, valued and appraised; wherein the sum of 113*l.* 10*s.* 9*d.* so found in his house, is expressly set down as his proper estate, but, in this inventory, the money found in *Welch-Hall* was not

1698. } not specified otherwise than under the general name of his stock in trade, and his part of the profits thereof: And that *John Tisley* was the only acting executor, and paid appellants several sums; but testator's daughter, *Elizabeth*, being an infant, and not intitled to receive her share, appellants did not call *John Tisley* to account till after her death; and in 1691, appellants preferred their bill in Chancery against the Executor, for a discovery and account; and *John Tisley*, in his answer, set forth the inventory taken 13th November, 1677, and distinguished the 1131*l.* 10*s.* 9*d.* as the proper estate of *Richard Tisley*; and set forth likewise his receipt of the 2012*l.* 2*s.* 6*d.* from *Christ's Hospital*, which he called money belonging to the estate in partnership; and having given an evasive account of other sums charged upon him by the bill, appellants took exceptions to his answer, but before they could be argued, *John Tisley* died, and made respondent, *Angelott Wright*, his executrix; so that appellants lost the benefit of their exceptions: And, in 1692, appellants revived their suit against respondents, who answered, and the cause was heard 23d May, 1693, before the Lord Keeper, and an account directed of both *Richard* and *John Tisley*'s estates; and respondent was decreed to be answerable for *John Tisley*'s receipts, as far as his estate could extend: And 14th November, 1694, the master reported, that *John Tisley* had received of *Richard*'s estate 6540*l.* 12*s.* 6*d.* including said sums of 1131*l.* 10*s.* 9*d.* and 2012*l.* 2*s.* 6*d.* and had disbursed 5361*l.* 3*s.* 8*d.* and that there remained due to appellants 1179*l.* 8*s.* 10*d.* to be paid by respondent out of the estate left her by *John*, which the master reported to be 1237*l.* 3*s.* 9*d.* To this report respondent excepted, and insisted that the 1131*l.* 10*s.* 9*d.* was part of the 2012*l.* 2*s.* 6*d.* found in *Welch Hall*, and not a distinct sum; and in 1695, the exception was argued, and the Court directed a trial at law upon this single issue, viz. whether the 1131*l.* 10*s.* 9*d.* was included in the 2012*l.* 2*s.* 6*d.* which issue was tried, in *Trinity*, 1695, before *Holt* Chief Justice, where respondent offered in evidence a pocket book, pretended to be kept and written by *John Tisley*, wherein was a memorandum, that he had paid to *William Pemberton*, one of *Richard Tisley*'s partners, 880*l.* 11*s.* 9*d.* out of the 2012*l.* 2*s.* 6*d.* and because 880*l.* 11*s.* 9*d.* and 1131*l.* 10*s.* 9*d.* make 2012*l.* 2*s.* 6*d.* they would infer, that the 1131*l.* 10*s.* 9*d.* specified in the inventory, was *Richard Tisley*'s part

part of the 2012*l.* 2*s.* 6*d.* found in *Welch-Hall*; and alleged that the inventory was not exhibited till April, 1178, which book was not proved to be *John Tisley's* hand-writing, though if so, no evidence in law, and so the Chief Justice declared; but one of appellant's counsel unwarily admitting the jury to see that book, they were misled by it (as some of them since acknowledged upon oath) and agreed to a verdict for respondent, which the appellants council perceiving, suffered a nonsuit; and in 1696, appellants applied for a new trial, which the chancellor declared he was tied up by the rules of the court from granting, unless the judge should certify the case proper for one; which the Chief Justice declined to do, because appellants had, through ignorance, neglected to apply whilst the cause was fresh in his memory; and therefore the Lord Chancellor ordered, that the 1131*l.* 10*s.* 9*d.* should be taken as included in the 2012*l.* 2*s.* 6*d.* and this decree was signed and inrolled; which respondents insisted ought to be reversed, and a new trial granted; because defendant, *John Tisley*, in the schedule to his answer, calls the 1131*l.* 10*s.* 9*d.* the proper estate of *Richard*, and calls the 2012*l.* 2*s.* 6*d.* money belonging to the partners; which, if the first sum had been included in the second, he would not have done, but would have distinguished; and because there were several goods, rings, and other things besides the bags of money found in *Welch Hall* not noticed in the inventory, which is an argument that the inventory was only made up of *Richard Tisley's* estate, and that no part of the 2012*l.* 2*s.* 6*d.* which was not numbered, when that inventory, was taken, would be included in the inventory; and because *Richard Tisley's* daughter had 1000*l.* bequeathed her by the will, to be paid at 21. which she, dying under age, never received, and appellants are now intitled to, and if the 1131*l.* 10*s.* 9*d.* be included in the 2012*l.* 2*s.* 6*d.* the daughter could have had no portion at all had she lived, and the executor would hardly have parted with all the estate till she was satisfied, or he had her discharge; and because it was proved in the cause, and at the trial that *Richard Tisley* left a great sum in ready money in his house in *Coleman's-Street*, besides that in *Welch Hall*, and no account is given of the money found in his dwelling-house, save by the inventory, which though not exhibited till April, 1678, was taken 13th November, 1677, at which time it was impossible for the executors to know

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{ 1698. } know how much of the money found in *Welch Hall*, belonged to *Richard Tilsley*; because that money was not told over till, the 2d *February* following: and because no pocket book could be given, in evidence in discharge of the party who kept it; but even so, the memorandum entered there will not support the inference made from it; for *John Tilsley* admits the capital stock in trade between *Richard Tilsley* and his partners, to be 400*l.* and *Richard Tilsley*'s share 230*l.* so that *Richard Tilsley*'s dividend of 2012*l.* 2*s.* 6*d.* would be 1157*l.* 17*s.* 7½*d.* and further, because the jury were misled by illegal evidence, and some have so acknowledged on oath; and the form of proceedings in Chancery ought not to outweigh the merits of a cause. And appellants insisted that new trials are frequently granted in the common law courts, where the evidence doubtful, or the jury misguided by illegal evidence, and a new trial might have been granted in this case, if appellants had not ignorantly mistaken the manner of applying for one in due time; and submitted, that a new trial would not take away respondent's right, but only bring it under a fresh examination, and give appellants an opportunity of asserting theirs, which they were in a great measure deprived of at the former trial by their own solicitors, who concealed many material papers from them.

J. Beref-
ford.

The respondents stated, that *Richard Tilsley* was in partnership with *William Pemberton*, *Robert Pemberton*, and *Edward Philips*, and kept the cash, and managed the trade at a place under *Guild Hall*, belonging to *Christ's Hospital*, called the *Welch Hall*, and there kept his own cash as well as the cash of the partners, and made his will, and appointed *William Pemberton* and *Philips* (his partners) and *John Tilsley*, executors, and died as stated by appellants, and that *Pemberton* and *Tilsley* proved the will; and 13th *November*, 1677, began to take an inventory, but did not exhibit it till *April* 15th, after when they preferred it in the Prerogative Court of *Canterbury*; and in that inventory is an item of 113*l.* 10*s.* 9*d.* mentioned to be in ready money at testator's decease, properly belonging to his estate, but not mentioned to be in testator's house; and in *Hillary Term*, 1690, the appellant *Ann* being married to *James Pottinger*, he and she exhibited a new bill in Chancery (though

1698.

(though she received her thirds according to the said inventory on a former bill) for an account of the said *Richard's* estate, which the said *John Tilley*, 18th June, 1691, answered, and annexed a copy of the inventory as the whole estate of the said *Richard*, and also annexed two accounts, one of the particular receipts of money, the other of his particular disbursements; among which former there is mention of 2012*l.* 2*s.* 6*d.* received in cash, belonging to the estate of *Richard Tilley* and partners, in a chest at *Christ's Hospital*; and among the payments there is mention of 880*l.* 11*s.* 9*d.* paid to *Pemberton*, to make up the cash in partnership, and soon after the said *John Tilley* died, having made his will, and the respondent sole executor thereof, against whom the plaintiffs (now appellants) revived that suit, and the cause was heard, and the master reported as stated by appellants; to which report both sides took several exceptions, and respondents first exception (which is the matter now in question) was, that the master had charged respondents with all the monies mentioned in the said account, which *John Tilley* had confessed to have received; and had moreover charged respondent with the 1131*l.* 10*s.* 9*d.* mentioned in the inventory, to belong properly to his estate. Whereas the 1131*l.* 10*s.* 9*d.* was part of the 2012*l.* 2*s.* 6*d.* mentioned in the account of particular receipts, to be in cash, belonging to the estate of said *Richard Tilley* and partners, as appears by deducting the 880*l.* 11*s.* 9*d.* paid to *Pemberton*, from the 2012*l.* 2*s.* 6*d.* the remainder being the 1131*l.* 10*s.* 9*d.* mentioned in the inventory: On hearing the cause on which exception, the Chancellor ordered the parties to proceed to a trial in *London*, whether the 1131*l.* 10*s.* 9*d.* was any part of the 2012*l.* 2*s.* 6*d.* or not, and to resort to the court for further direction: And on the trial, after a full hearing of witnesses on each side, and examination by the court and jury, of books and papers produced on each side, the jury being ready to give a verdict, the appellant voluntarily became nonsuit, and thereby gave up the cause; after which the cause was heard before the Chancellor, who ordered that respondents said exception be allowed, and that the 1131*l.* 10*s.* 9*d.* be taken as part of the 2012*l.* 2*s.* 6*d.* and over-ruled the other exceptions on both sides, and referred it back to the master to make his further

1698. { further report therein; but the appellant petitioned for, and obtained a rehearing of the said exception, and on a full debate, the Chancellor ordered the Master to proceed according to former order; and. 1st *May*, 1697, the Master made his further report, and certified due to the appellants, 47*l.* 18*s.* 9*d.* which report was duly confirmed; after which appellants summoned respondent twice before Lord Chief Justice *Holt*, to obtain his certificate for a new trial; who, upon hearing council on both sides, saw no cause to certify any ground for a new trial, which the Court of Chancery also refused to grant, though often moved for that purpose; and the decree being now signed and enrolled, respondent hoped the said decree should be affirmed, because respondent is only executrix of an executor, and an utter stranger to this whole affair, which was transacted above twenty years since, and because the issue was directed to be tried at law, on a fair and full hearing of council on both sides, and not by any consent of appellants council, or at the importunity of respondent's council; and lastly, because the trial was had by a substantial jury of *London*, upon a full and long examination of the whole matter, upon producing all the books relating to the E. Nor-said partnership, and hearing the whole evidence and allegations on either side.

Die Marturii, 22^o *Junii*, 1698, after hearing council on both sides on this appeal, It was ORDERED and ADJUDGED by the Lords, that the said petition and appeal be dismissed, and the several orders and report complained of be affirmed. *Lords Journ.* vol. xvi. 325.

1698.

John Berkely, Esq. *Reginald Bretland*, Serjeant at Law, and *Robert Fowle*, Goldsmith, } Appellants.

Jonathan Cope, *William Cope*, and
Anthony Cope, Infants, by Sir
Thomas Pesball, Bart. and others, } Respondents.
 their Guardians,

THE appellants stated, That Sir *Thomas Fowle*, Case 8.

by his will, dated 30th *July*, 1691, bequeathed two fee farm rents, (in the will particularly mentioned) one 76*l.* 6*s.* 8*d.* *per ann.* the other 50*l.* *per ann.* to appellants *Bretland* and *Fowle*, (his executors) and their heirs; and directed that they, out of his personal estate, should purchase lands and hereditaments, to make up said two fee farm rents 300*l.* *per ann.* and should permit and suffer *Susanna*, his daughter, then the wife of *Jonathan Cope*, during her life, to take the rents and profits of the old rents and new purchase, to her own separate use; and afterwards permit and suffer such child or children of *Susanna*, to take the rents and profits, or any part thereof, for such term and estate; and charged or chargeable with such sum or sums of money, as *Susanna*, (distinct without her said husband or any other husband) by any writing, deed, or will, signed, sealed, and published, in the presence of two or more witnesses, should appoint; and that in case of no such direction or appointment, the trustees should convey the same to the use of *Thomas Cope*, son of said *Jonathan* and *Susanna*, for life; remainder to his first and other sons in tail male; remainder to all the sons of *Susanna* by *Jonathan*, successively, in tail male; remainder to all her sons by any other husband, successively, in tail male; remainder to the right heirs of Sir *Thomas Fowle*. And that *Jonathan Cope*, by his will, dated 15th *July*, 1694, appointed all his debts to be paid, and made his wife executrix, during her widowhood, and died greatly indebted, much more than his personal estate could satisfy. And *Susanna*, to satisfy her husband's debts, (about 5000*l.*) and being advised she had power to discharge appellants, *Bretland* and *Fowle*, from laying out any sum in the purchasing of lands and hereditaments, to make up the said

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said two fee farm rents 300*l. per ann.* inasmuch as she might, under her father's will, charge the lands, when purchased, with such money as she should think fit. She therefore, by articles, dated 23d *July*, 1695, between her and appellants, *Bretland* and *Fowle*, (in consideration of 348*ol.* then paid, or *bonâ fide*, discounted to her, being the sum then computed sufficient to make up the fee farm rents, 300*l. per ann*) acquitted, released, and discharged *Bretland* and *Fowle*, their executors and administrators, from laying out the 348*ol.* or any part thereof, in the purchase of lands, to be settled as aforesaid; and in case *Bretland* and *Fowle* should afterwards be compelled so to lay out that money, then *Susanna*, pursuant (as she apprehended) to her said power, thereby directed appellants, *Bretland* and *Fowle*, to convey and settle the lands so to be purchased, to the use of themselves and their heirs in trust, for them and their heirs, during her life; and after her death, subject to repay *Fowle* the 348*ol.* and interest and costs, in trust for *Jonathan Cope*, (son of *Susanna*) and his heirs. And afterwards, in the same year, 1695, *Susanna* intermarried with appellant, *Berkeley*, and, pursuant to said power, and also to a power reserved to her on her second marriage, made last will in writings, dated 31st *January*, 1696, and (amongst other things) gave to *William Cope*, her second son in tail male, the fee farm rent of 76*l. 6s. 8d. per ann.* payable by the Archbishop of *Canterbury*, remainder to *Anthony*, her third son, in tail male; remainder to *Jonathan* the elder son, in tail male; remainder in fee to appellant *Berkeley*; and devised unto *Anthony Cope*, her third son, in tail male, the fee farm rent of 50*l. per ann.* payable by the Dean and Chapter of *Norwich*; remainder to *William Cope*, in tail male; remainder to the said *Jonathan Cope*, in tail male; remainder in fee to the appellant, *Berkeley*, and made him executor. After whose death, the respondents brought their bill in Chancery, praying that the appellants, *Bretland* and *Fowle*, might purchase lands to make up the said fee farm rents, 300*l. per ann.* for the benefit of the respondents, the infants, according to Sir *Thomas Fowle's* will. And on the hearing of the cause, 23d *July*, 1698, the Court declared, That the power of charging the said fee farm rents, and the lands to be purchased to make up 300*l. per ann.* was, by the will of the said Sir *Thomas Fowle*, only for the benefit of the respondents; and that said power must be restrained to the same persons to whom the estate thereby

was

1698.

was limited, and that *Berkeley's* wife had no power to receive the money from the trustees, or to dispose thereof: and therefore decreed, that appellants, *Bretland* and *Fowle*, should purchase so much lands as would make up the said fee farm rents 300*l. per ann.* according to Sir *Thomas Fowle's* will, and settle the same on the said *Jonatban Cope*, discharged of the 348*ol.* Which decree appellants conceived to be erroneous, for that by such construction of the said will, the power given by Sir *Thomas Fowle* to his only child, upon a voluntary gift, is in effect defeated; and appellants, *Bretland* and *Fowle*, are compelled to lay out 348*ol.* of their own monies, to make up the said fee farm rents, 300*l. per ann.* and must resort to appellant, *Berkeley*, to have the same made good out of the estate of his late wife, which construction is the harder, because the power was only made use of to pay the debts of the respondent's father; and because, upon the marriage of *Susanna* with *Cope*, there was otherwise ample provision made for the issue of that marriage, and by Sir *Thomas's* will, very considerable and other legacies are given to some of the respondents: and because appellant, *Berkeley*, will be thereby deprived of that little part of his wife's estate, (which was in her disposal after payment of her husband, *Cope's*, debts) and therefore insisted the decree should be reversed as to the matters aforesaid.

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Nath.
Wright.
Edward
Northey.

The respondents made this case:—Sir *Thomas Fowle* was possessed of a personal estate of 40,000*l.* and seised of the two fee farm rents, stated by appellants; and *Susanna*, his only child, wife of *Jonatban Cope*, having had issue, *Thomas* and *Jane Cope*, since deceased, he, Sir *Thomas*, made his will in writing, as stated by the appellants; and *Jonatban Cope*, the elder, having died, *Susanna*, in 1695, married appellant *Berkeley*, and is since dead; and *Bretland* and *Fowle* now pretend a discharge from her whilst a widow, from the obligation to purchase the remainder of the 300*l. per ann.* in consideration of 348*ol.* applied, as is suggested, towards discharge of the debts of *Jonatban*, her late husband, to the discharge whereof, Sir *Thomas's* estate was not liable, and insist on the articles of July, 1695, stated by appellants, under colour of a pretended power in her, to charge the lands, when purchased, with

1698. { with any sum of money indefinitely, under Sir *Thomas Fowle's* will. And *Susanna* now insists, by a strained equity, that, as she might charge the lands, when purchased, to the value thereof, so she might discharge *Bretland* and *Fowle* from making such purchase. But respondents insisted, it appears by the deed so executed, as shewed by appellants, that without the counter security thereby provided, the appellants did not consider themselves secure. And respondents further insisted, that all this was done in fraud and prejudice to respondents, as was *Susanna's* will, leaving the inheritance of the fee farm rents to *Berkeley*, after the determination of the estates tail, thereby created: and that the power of charging the fee farm rents and lands to be purchased, must be restrained to the same persons the estate was limited to; and that the appointment thereof, by *Susanna's* will, (being contrary thereto) was a void appointment, and so was decreed by the Lord Chancellor.

Rbt. Dor-
mer.
Thos. Fil-
mer.

After hearing council on this appeal, (*Die Luna*, 13^o February, 1698) it was ORDERED and ADJUDGED by the Lords, That the said petition and appeal should be dismissed, and the decree complained of affirmed. *Lords Journ.* xvi. 382.

Sir *Sewster Peyton*, Bart. - - Appellant.

Humphry Brown, - - - Respondent.

Case 9.

THE appellant stated that Sir *Algernon Peyton*, his father, had married *Frances*, daughter of Sir *Robert Sewster*, and was seized in possession of the manor of *Doddington*, 630*l.* per ann. and in reversion, after the end of a lease of one-and-twenty years, to expire at *Michaelmas*, 1683, of the manor of *Coldham*, 620*l.* per ann. but during that lease only 100*l.* per ann. and had two children, appellant, five months old, and *Anne*, a year and an half old, and his wife being enient, he, 17th May, 1676, by his will devised to his Lady *Dame Frances* an annuity of 500*l.* per ann. for her life, payable out of those two manors and lands belonging; and

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and gave 1500*l.* to his daughter *Anne*, and 1000*l.* to the child his wife then went with, payable at twenty-one, or marriage; both to be raised out of the profits of those estates. And willed that his wife receive the profits during Sir *Sewster's* minority, and after till the portions raised to pay herself the 500*l. per ann.* and then for Sir *Sewster's* education and maintenance as she should think fit, not exceeding 60*l. per ann.* till fifteen years old; and after that 100*l. per ann.* and after that the younger children's portions. And the better to enable his wife to be kind and liberal to his children, gave her all his goods, chattels, and personal estate, and made her executrix, and died two days after; and the Lady entered upon *Doddington*, and received the profits, and the reserved rent of *Coldham*; and she possessed the personal estate. And, in *October*, 1672, married *Johanna Skelton*, Esq; who, in her right, possessed the whole real and personal estate; and they continued the receipt of all the profits thereof. Sir *Robert Sewster*, appellant's maternal grandfather, being seized of the manors of *Great Ravely*, and other lands in *Huntingdonshire*, of near 300*l. per ann.* by his will, 27th *January*, 1675. gave the same to Dame *Anne*, his wife, for life, and after to appellant, his grandson, charged with 500*l.* for his wife; and died that month, and his wife died the same week intestate: And Lady *Peyton* and *Skelton* had administration to her; and, as guardians to appellant, entered on *Ravely*, and received the profits thereof also. And on pretence of arrears of the 500*l.* annuity, debts of Sir *Algernon*, taxes and other outgoings, *Skelton* and Lady, 6th *May*, 1676, exhibited a bill against Sir *Sewster*, then not five years old, to have their accounts of *Doddington* and *Coldham* settled; and in four days had an answer put in for Sir *Sewster* by a guardian of their own nomination, and in *Trinity*, 1676, exhibited a cross bill in Sir *Sewster's* name, by such guardian, against themselves; which, in a few days, they answered, annexing accounts of their receipts and payments; but taking no sort of notice of *Ravely* estate, and had publication passed as by consent. And, 28th *October*, 1676, had both causes heard, and an account directed of *Skelton's* receipts and payments, touching the real and personal estate of Sir *Algernon Peyton*; and also a yearly account from thenceforth, so long as the trust under his will should continue; and also an account of what appeared due to *Skelton* and his wife; and this the lands in

{ 1698. } in possession and reversion were to stand charged with according to the will. And, 1st *December*, 1676, the Master reported, that the personal estate of Sir *Algernon* was 307*l.* 1*s.* 7*d.* and payments relating to it 673*l.* 13*s.* so that that estate was in disburse 366*l.* 11*s.* 5*d.*

	<i>£.</i>	<i>s.</i>	<i>d.</i>
That the rents of the real estate, to <i>Lady-day</i> , 1676, amounted to	2342	5	3
And the payments relating to it	660	9	1
And maintenance of Sir <i>Sewster</i> , at 60 <i>l.</i> per ann.	290	0	0
	950	9	1

So remained of that estate *£.* 1391 16 2

Which being applied to pay the Lady's annuity of 500*l.* there remained still due to her and *Skelton*, according to that account, 1108*l.* 3*s.* 10*d.* which report was confirmed without objection, that account being taken just as *Skelton* and his Lady pleased. And, 19th and 20th *November*, 1677, *Skelton* and his Lady mortgaged that account, and their 500*l.* per ann. annuity, to Sir *John Tracy* for 650*l.* and interest to be paid in three years. And 20th *February*, 1679, the Master, at the like instance of *Skelton* and wife, made another report, taking the account to *Michaelmas*, 1679, and reported then due to them 1394*l.* 3*s.* 7*d.* and on the very next day an order was made, as by consent of council on both sides, to confirm that report, Sir *Sewster* being still an infant; and in all these accounts no notice whatever was taken of *Ravely* estate, though *Skelton* and wife had been in possession of it four years, and had received thereout near 1200*l.* And same day, 21st *February*, 1679, respondent *Browne* lent *Skelton* and Lady 1000*l.* (the money now in question) of which 490*l.* was paid to the Lady *Tracy*, executrix of Sir *John Tracy*, upon his assigning his security to *Brown*; and 510*l.* to *Skelton* and Lady upon their joining with the Lady *Tracy*; and also assigning over the 500*l.* charged by Sir *Robert Sewster* on *Ravely* estate, upon a proviso to be void on paying the 1000*l.* at four years end, and interest in the mean time; and made a letter of attorney to sue for, and recover the 1934*l.* in order to pay the 1000*l.* and interest, with covenants to pay. And *Brown* had also a statute of 2000*l.*

1698.

200*l.* from *Skelton* as a further security; all which, being done at the same time, appears to be done with a design to load the *Doddington* and *Caldham* estates, and to let *Skelton* go away with the profits of *Ravelly*, though *Brown*'s mortgage takes notice of that estate, and includes 500*l.* charged upon it. And, 12th *February*, 1683, *Brown* agreed to continue the money a year longer; and in *Trinity* Term, 1685, Lady *Peyton* died; *Brown* having permitted her and her husband to continue possession all that time. In *Michaelmas* Term, 1685, *Brown* exhibited his bill in Chancery against *Skelton* and appellant to have his money out of the land. And appellant, by his guardian, exhibited his bill against *Skelton* and *Brown* for the writings of his estate, and for account of the profits of all the estates; and, 19th *February*, 1686, both causes were heard at the Rolls; and a decree for *Brown* to have his money, interest, and costs out of the estate, and *Skelton* to account; but the account, previous to the Master's reports, not to be ravelled into, and he to be allowed for maintenance of the younger children. And, 15th *December*, 1687, on a rehearing, the same order in effect was made; *Brown* being to be paid as far as the 1934*l.* and interest would extend; but, by that order, appellant had leave to amend his bill, touching omissions and over charges in *Skelton*'s account, and otherwise as council should advise: And accordingly, in *Hillary*, 1687, appellant amended his bill, charging divers rents omitted out of the Master's report, and an overcharge of 120*l.* for two year's maintenance of appellant whilst he was at his grandfather's. And charging, that *Brown* was well acquainted with the nature and contingency of his security, and was desired to call in his money, and to enter, and not let *Skelton* receive the rents; and that *Brown* had, for gratuities given him, permitted *Skelton* to continue possession. And in *November*, 1688, *Brown*, to that bill, pleaded the former decrees and pleadings: And, 8th *July*, 1689, and 30th *June*, 1690, the plea was argued before the late Lords Commissioners, and ordered to stand for an answer, and the benefit saved to the hearing, and the cause to proceed to hearing; and the former depositions, by consent, to be made use of: And, 13th *June* and 24th *February*, 1694, the causes were heard, and the plea re-argued before the Chancellor, who confirmed the order of 15th *December*, 1687, declaring that the profits received by *Skelton* and wife,

1698. } wife, out of the *Peyton* estate, (but not *Ravelly*) must be applied to sink *Brown's* debt; and allowed *Brown's* plea to the amended bill; so that appellant had no relief for the omissions and overcharges, nor for the profits of *Ravelly* estate; amounting together to about 4000*l.* and must besides pay *Brown* 1000*l.* interest and costs; *Stelton* having gone beyond sea, and left nothing to answer, but left appellant indebted for maintenance 142*l.* which appellant had paid since; besides many other sums for his school and education, while *Stelton* and wife received the profits of his estate. And appellant insisted that, if this account should not be opened, it will be in the power of any guardian to defeat an infant of half the profits of an estate; for interest is to be charged for the 1934*l.* without discount of the profits of both estates; which would have sunk the principal. And further insisted, that *Brown* ought to stand in the place of *Stelton*, and be accountable for the profits of *Ravelly*: And that *Stelton* receiving the profits of both estates of the infant, both ought to go to alleviate any debt of the infants to him, as the arrears of the 500*l. per ann.* annuity were; and he ought not to have sold or mortgaged the debt to him upon *Doddington* and *Coldham*, to defeat the infant of what was due from him upon account of *Ravelly* estate. And appellant further insisted, that maintenance ought not to be allowed younger children, when the estate was not chargeable with it by the will, but only with the portions to be raised out of the profits; and the mother, having so large a provision, might well maintain two younger children. And further insisted, that the plea ought not to have been allowed, but an answer ought to be made to the amended bill, especially as to the omissions, overcharges, and gratuities; and that as matters of account only were decreed in the first cause in 1676, the objection of publication of former proofs ought not to prevail: And further insisted, that costs ought not to have been given in this case, being at best a fraud, which the other side insists is too hard for a court of equity. And appellant prayed, that the account might be opened, and a discovery made of the omissions, overcharges, and gratuities, and an account given of both estates; and that *Brown* should stand in *Stelton's* place to all intents and purposes, his mortgage being of a new nature.

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The respondent agreed as to the wills of Sir *Algernon Peyton* and Sir *Robert Sewster*; but stated, that after the death of Sir *Robert* and of Lady *Sewster*, Dame *Frances Peyton* took out letters of administration to Lady *Sewster* her mother, and thereby became entitled to the legacy of 500*l.* charged on *Raveley*. And that Dame *Frances*, appellant's mother, was his guardian, and received the profits of his father's estate, and married *Skelton*, who, with his said wife, exhibited their bill against the appellant as stated by him; and that a cross bill was exhibited by appellant; and that the causes were heard, and an account decreed to be taken of *Skelton*'s receipts and disbursements, touching Sir *Algernon*'s real and personal estate, and a yearly account at every *Michaelmas*, so long as the trust continued, and agreed with appellant, as to the accounts taken, and the mortgage to Sir *John Tracy*, and subsequent reports and mortgage to the respondent; but further stated, that at *Michaelmas*, 1683, the lease of the manors of *Coldham* expired; and that estate, which before was but 100*l.* *per ann.* became 500*l.* *per ann.* and that, after the death of *Skelton*'s wife, respondent exhibited his bill against *Skelton* and appellant; and appellant exhibited his bill against the respondent and *Skelton*, as stated by appellant; but appellant assigned no particular error in the account stated, nor any fraud against respondent, and shewed the decree pronounced in both causes, and that appellant had obtained a re-hearing, and the decree thereon, whereby respondent was to be liable to all the receipts of *Skelton* and wife, out of the said estate, since the Master's report; and appellant's council alledging his bill defective, as to several charges and omissions in the account taken by the Master, he had liberty to amend his bill; and with these alterations the former decree was ordered to stand: And that appellant amended his bill, but it being after publication and hearing, the respondent put in a plea thereto. And the causes being heard, 20th *February*, 1694, the Chancellor then declared, that the profits received by *Skelton* and wife out of the *Peyton* estate, but not these received out of the *Sewster* estate, must be applied to sink respondent's debt; and that the decretal order of the 15th *December*, 1687, should stand; but if the respondent should insist to have the benefit of the legacy of 500*l.* so given by Sir *Robert Sewster*, then the profits received by *Skelton* and wife, out of Sir *Robert*'s estate, were

1698. }
 were to come in account so far only as to sink the demand of the 500*l.* legacy; and respondent's said plea was allowed. And the Register having mistaken the Court, as to the direction in the last order of not giving costs, although by the last order, the former order of the 15th *December*, (whereby costs were given to respondents was to stand) respondent petitioned for a rehearing touching costs only; and the cause was reheard, 24th *December*, 1697, and appellant's council heard thereto, and the Court decreed respondent his costs of these suits; and respondent insisted such decree was according to the rules of equity; and that respondent, who *bona fide*, lent 1000*l.* near twenty years since, should be repaid the same with interest and costs, (as all mortgages ought.) And that the respondent, who had been twelve years in recovering a just debt, and had three decrees, should at last be at peace; and prayed the decree may be affirmed.

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 Dobyng.

Die Martis, 14th *February*, 1698. Upon hearing council on both sides, on the petition and appeal of Sir *Sewster Peyton*, from several decrees and orders of the Chancery, in several causes between *Skelton* and wife, plaintiffs and appellant, by his guardian, defendant, and *è contra*: And between *Brown*, plaintiff and appellant, and *Skelton*, defendants: And between appellant, by his guardian, plaintiff, and *Brown* and *Skelton*, defendants—It was ORDERED and ADJUDGED by the Lords, that the said several decrees and orders of the Court of Chancery should be reversed, so as that *Brown* should stand in the place of *Skelton* and wife, to account for the rents, issues, and profits, as well of the manor of *Ravely*, as of the manors of *Coldham* and *Doddington*, received since the deaths of Sir *Algernon Peyton* and Sir *Robert Sewster* respectively, in order to satisfy the money due to *Brown*: And that the accounts stated in the Court of Chancery, in 1676 and 1679, be laid open for that purpose, and that the Court of Chancery give directions accordingly. *Lords Journ.* vol. xvi. 383.

William

1698.

William Smallman and Thomas Gregory, } Appellants.

Humphry Brayne and Richard Walker, Respondents.

THE appellant stated that respondents, as lessees of *Caſe. 10.* the Bailiffs and Burgeſſes of *Bridgnorth*, in the county of *Salop*, of certain Mills, called *Pendleton's Mills*, brought their bill in the Exchequer againſt appellants, to compel them to grind all corn and grain uſed in their houſes at ſaid mills, on pretence of a cuſtom, that all bakers, brewers, reſidents, Burgeſſes, and other inhabitants of ſaid town, had uſed, and of right ought, to grind all corn and grain, ſpent and uſed in their houſes, at ſaid mills, and not elſewhere; and prayed a diſcovery of the quantities of corn and grain appellants had ſo uſed within the time ſtated in the Bill; and that appellants might in future be compelled to grind all corn and grain uſed in their houſes at ſaid mills, and appellants, by their answers, denied the cuſtom, and inſiſted that foreign millers publicly came into town at all times, and carried away the ground and grift of the Burgeſſes and other inhabitants, time out of mind, to be ground at other mills; and brought the ſame back publicly, when ground, without interruption, eſpecially when, by extortions and delays, the inhabitants were ill uſed at respondents mills; which appellants had frequently been to their great damage. And witneſſes being examined on both ſides, the cauſe was heard in the Exchequer chamber, 25th *November*, 1697, and a trial at law directed at the then next aſſizes of *Salop*, to try whether any ſuch cuſtom, as alleged by respondents, which appellants were ready to have tried. But the respondents declined a trial at law, knowing they could not prove their pretended cuſtom by witneſſes to be examined, *via voce*, and that the greater part of appellants witneſſes had not been examined, becauſe they conceived the proof made, ſufficient to induce the court to direct a trial as in like caſes; but 11th *February*, 1697, upon the respondents motion and petition, they obtained an order for rehearing, and 2d *July*, laſt the cauſe was reheard, and it was then decreed, that the pretended cuſtom ſhould be, and was thereby raiſed and eſtabliſhed without any trial

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trial at law; and that appellants, and all claiming under them, should from thenceforth, during respondents term, pay their suit and soke to the said mills, and grind all corn, grain, and malt, consumed and used in their houses, in the said town, at respondents mills, and not elsewhere; and that in case respondents should not grind same, in forty-eight hours after it should be brought to the mills, then appellants were at liberty to take it away, and grind it at any other mills at their pleasure; which decree appellants insist is erroneous, for that the custom ought to have been previously tried, as it was in this very case directed upon the first hearing, it appearing on the face of the said decree to be a controverted custom; and because many of the appellants witnesses were rejected, because they were townsmen; and appellants imagining townsmen as good witnesses for them as for the respondents, omitted examining above sixty very old witnesses, not townsmen; who would have falsified the pretended custom. And further, because all customs are properly triable at law by a jury of the neighbourhood, before they can be established by a court of equity, especially in a matter against common right, as this supposed custom is: and because by this decree, no provision is made to oblige respondents to grind their corn well, and take reasonable toll, and by this decree the appellants must leave their corn forty-eight hours to be ground at these mills, though they want bread; and appellants prayed that the decree might be reversed, and a trial at law directed to try the custom, and submitted that if respondents have such a custom, it must be so found by a jury, and respondents will have their costs against appellants, and so can receive no prejudice by a trial; on the contrary, it will be binding to appellants for ever, and consequently a mighty mischief and prejudice to all the inhabitants of that great town.

James
Sloane,
Edmund
Bridges.

The respondents on the other hand stated, that *King Henry* the third, by letters patent, dated 20^o Junii, 11^o *Regni sui* granted (*inter alia*) unto the Burgesses of *Bruges* (now called *Bridgnorth*) in the county of *Salop*, and their heirs for ever, that they and their heirs should have to fee farm the mill of *Pendaston*, without the said town upon the river *Wurg* (now called *Wosse*) with the suit of said town, and all other appurtenances, rendering to the crown Ten Pounds *per. ann.* payable at the Exchequer at *Michaelmas* and *Easter*, and that this grant

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grant had been confirmed by several succeeding Kings, and that the burgesſes became ſeized of the ſaid mill, with the ſuit thereof, ſubject to the ſaid fee farm rent, and have ever ſince enjoyed it; and that reſpondents, being ancient tenants of the mill, the bailiffs and Burgeſſes, in conſideration 160*l.* fine and 60*l.* *per. ann.* rent, by indenture, dated 23d *March*, 1691, demised the ſaid mill, being four water corn mills under one roof, called *Pendaſſon* mills, together with ſuit to the ſaid mills of all manner of corn, mulſture, and toll, of all the inhabitants of the ſaid town, to hold to reſpondents for twenty-one years, under the rents and covenants therein expreſſed; and in particular under one ſpecial covenant, that reſpondents ſhould make ſatisfaction to the inhabitants for all damage to be ſuſtained in grinding their corn, by reſpondents, at ſaid mills, on oath of the party grieved, or other ſufficient witneſs: And ſhewed that the Millers ſervants are all ſworn to be juſt and true to the ſuiters; and that *Pendaſſon* mills are good mills, and kept in good repair by reſpondents, and will grind all the corn and grain of all the inhabitants of the ſaid town in due time; and that reſpondents keep men and horſes ſufficient for the purpoſes of the mills; and that appellants (though reſident Burgeſſes of the town) withdrew their ſuit from ſaid mills, and ſent their corn and grain to other mills, whereby reſpondents loſt the benefit of ſuch toll, which, if permitted, all other the inhabitants may do ſo; whereby reſpondents would be defrauded of their juſt right, and diſabled to pay the fee farm rent to the Crown, and the improved rent to the ſaid town, and to keep the mills in repair; and that therefore reſpondents brought their bill againſt appellants, to confirm the cuſtom, and compel appellants to grind at, and do their ſuit to the ſaid mills: And appellants answered, and witneſſes were examined, and the cauſe heard, two of the Barons only being preſent, and an iſſue was directed to try the cuſtom; and reſpondents council thinking they had a full proof for a decree, without a trial, and having omitted to read, ſeveral of their witneſſes petitioned for a rehearing, which was ordered, and the cauſe was reheard before Sir *Edward Ward*, Chief Baron, Sir *Nicholas Lechmere*, Sir *Littleton Powys*, and Sir *Henry Hatſel*, Barons, and on full examination, the whole Court declared they were fully ſatisfied that there was ſuch a cuſtom, and that there was no ground for a trial at law, and confirmed the

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ſaid

1698. said custom; but directed it to be inserted in the said decree, that if any of the inhabitants should bring corn or grain to the said mills to be ground, and that it should not be ground in forty-eight hours, that then such person should be at liberty to take away such corn and grain, and grind it elsewhere, as in many like decrees hath been used.

Q. Did not this latter part of the Decree introduce a new Custom?

Die Jovis, 23^a Februarii, 1698, after hearing council on this appeal, it was ORDERED and ADJUDGED by the Lords, that the petition and appeal be dismissed, and the decree complained of affirmed. *Lords Jaur. vol. xvi. 388.*

Hugh Griffith, Gentleman, - Appellant.

William Anvill, and Jane, his Wife, Respondents.

Case 11.

THE appellants stated, that *Owen Wynne*, Gentleman, respondent, *Jane's* former husband, and *Ellin Wynne* his mother, being severally seised of lands in *Carnarvon* and *Anglesey*, marriage articles, dated 12th May, 1683, were made between *Thomas Lloyd*, respondent, *Jane's* father, on the one part, and said *Ellin* and *Owen* of the other part; whereby it was agreed, that *Ellin* and *Owen* should, on request of *Thomas Lloyd*, settle the same on such persons as the said *Thomas Lloyd* should appoint, to the use of *Owen Wynne* for life, remainder to his issue on the body of *Jane*, and that in such articles there was a proviso, that the seoffees, should stand seised, to the intent that *Jane*, if she survived *Owen*, might, out of the profits thereof, receive and take 35*l. per. ann.* for her life in lieu of dower, with power to distrain for non-payment, and in failure of distress, to enter and enjoy; and a covenant, that *Owen* should pay *Thomas Lloyd* 800*l.* and that in consideration thereof, *Thomas Lloyd* should settle his estate, being 150*l. per. ann.* (though alleged to be 200*l. per. ann.*) as follows, viz. 50*l. per. ann.* thereof upon *Owen* and *Jane*, in possession for their lives, 30*l.* more for their lives after the death of the mother of the said *Thomas Lloyd* (who was then alive) and subject to 200*l.* charged,

charged, after *Thomas Lloyd* and his wife's deaths (who were also then alive) remainder of all to the issue of *Owen* and *Jane*, in tail, remainder over unto *Thomas Lloyd* and his right heirs for ever; and that *Thomas Lloyd* received the said 800*l.* and settled his estate according to the said articles, 13th *February*, 1684, and the 800*l.* went to pay his debts; and that *Jane*, in 1686, three years after marriage, left her husband *Owen*, and went and lived with her father in a remote country, separate from her husband, during his life; that *Thomas Lloyd* never requested a settlement from *Ellin* and *Owen Wynne*; and *Ellin* died about 1688, so that her estate comprised in the articles, descended to her heir at law, and was lost to her son *Owen*, by *Lloyd's* neglecting to request the settlement: Appellant in, 1690, became intimate with *Owen*, and did him several services till death; and 17th *October*, 1691, *Owen Wynne*, by agreement with *Thomas Lloyd*, granted *Jane* a separate maintenance of 29*l. per. ann.* out of the 50*l. per. ann.* which they had out of *Thomas Lloyd's* estate, after which *Owen* had but a small matter towards his 800*l.* and it was fully proved that *Jane*, and his own next relations, had disobliged him, and that having no children, and having particular kindness for appellant, he, long before his death, resolved to give appellant both his real and personal estate, and so declared and published; and several of his friends and relations often endeavoured to dissuade him from it; and appellant had, at *Owen's* request, entered into a bond for payment of 30*l.* to a niece and nephew of *Owen Wynne*, and into another bond of 40*l.* for payment of 3*l. per. annum*, for several years unto his servant; in consideration whereof, and of his said resolutions and kindness towards appellant *Owen*, by deed, dated and executed 27th *September*, 1694, gave and granted unto appellant all his personal estate, and then put him in actual possession thereof; and by his will, dated the same day, devised unto him his real estate (part whereof he had purchased since his marriage) and made him his executor; and it was duly proved that, at the execution of the deed and will, *Owen* declared to the witnesses, that if appellant had not accepted of his kindness, he would have given all to a stranger, rather than his wife or relations should have it; and in *November*, 1694, died without issue, having no longer interest in *Thomas Lloyd's* estate, so that the 800*l.* was sunk; and in, 1696, respondents, at the great sessions held at *Carnarvon*, exhibited

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exhibited their bill against appellant and *Owen Wynne*, Esq. to have the said 35*l. per annum* paid and secured, according to the articles: And appellant and *Wynne*, in their answers, denied to have received one penny of the article premises; and the appellant denied that *Owen* had any personal estate at his death; but said, that what appellant had, under the deed of sale, might be worth about 400*l.* and 18th *August*, 1697, the cause was heard before *John Hook*, Esq. Judge of that Court, and though it appeared appellant had an absolute estate in the said *Owen*'s article premises, and that the rent remained in the tenants hands, yet it was decreed that *Owen*'s personal estate, which came to appellant, should, in the first place, answer the 35*l. per ann.* to *Jane* for life, and that after that should be exhausted, the profits of the realestate, devised to appellant, and descended to *Owen Wynn*, Esq. the heir at law of the said *Owen*, should answer it; and decreed an account, and appellant to be examined upon interrogatories: Appellant was not so examined, but exceptions were taken by both defendants to the registers report which being argued, altho' it appeared by the report, and by some exceptions to that purpose being allowed, that all the rents remained in the tenants hands, sufficient to answer the 35*l. per Annum* and arrears, yet it was further decreed that appellant pay respondents 105*l.* three years arrears of the 35*l. per annum* out of the personal estate, and the 35*l. per annum*, as far as the personal estate, being 400*l.* would extend; which decree appellant insisted should be reversed, because the 35*l.* arising by a proviso, with power of distress and entry, was a mere real charge on the article premises, and that *Lloyd* never requested *Ellin* and *Owen* to make a settlement according to the said articles; and because all the rents were in the tenants hands sufficient to answer the 35*l. per annum* and arrears; and because the decree extends to charge lands purchased by *Owen Wynne* subsequent to the articles; and though the said rent charge had not been a meer real charge, yet the personal estate disposed of by *Owen* in his life time, ought not to have been made liable thereto; and that though the personal estate had been liable, yet it ought in the first place to have been made liable to answer *Owen*'s debts, funeral expences, and costs of said suit, and to indemnify appellant from the 30*l.* and 40*l.* bonds; and because no consideration is had by the decree for *Ellin Wynne*'s said article

articled estate, lost by *Thomas Lloyd*'s requesting said settlement from her; and lastly, because, by the articles, the rent charge is liable to taxations, trouble, and charges of distress and entry, which the decree, by charging the personal estate there with, makes it free from, contrary to the agreement in the articles.

The respondents stated, That *Thomas Lloyd* was, in 1683, seized in fee of lands worth 160*l.* *per ann.* and had issue, respondent, *Jane*, his only child, then thirteen years old, and entered into articles with *Owen Wynne*, then of full age, and *Eleanor*, his mother; (*Wynne* pretending he had an estate of inheritance worth 70*l.* *per ann.*) agreeing, that in consideration of a marriage intended between *Owen* and *Jane*, and other considerations, a clear yearly rent charge of 35*l.* should be granted to *Jane* for her life, out of *Wynne*'s real estate, if she survived him, and that the inheritance thereof, should be settled on their issue, and that *Owen* and *Eleanor* should pay *Lloyd* 800*l.* as a marriage portion; and *Lloyd*, in consideration thereof, was to settle all his real estate, part in possession, and part in reversion, on *Owen* and *Jane*, for their lives; remainder to their first, second, and other issue, in tail; and that the marriage took effect, and *Lloyd* settled his real estate, and executed the said agreement in all things on his part; but *Owen* and *Eleanor* did not execute any grant of the rent charge, nor settle any lands according to the marriage agreement; and *Owen*, after several years cohabitation, proved an unkind husband; and, after he had often immoderately corrected his wife, without any cause, forcibly turned her out of his doors, and sent her to her father's, where she continued upon a slender separate maintenance, until *Owen*'s death, in *November*, 1694; for some years before which, appellant, who was no relation, insinuated himself to his favour, being his agent and tenant, and was principally instrumental to his ill disposition to his wife, sisters and relations; and when he sickened, and began to decay in his health, appellant, who was an attorney at law, prepared several voluntary and fraudulent instruments for him to seal, on purpose to defeat *Jane* of her marriage agreement, *viz.* one obligation of great penalty, conditioned for payment of 480*l.* to appellant, though appellant was then indebted to *Owen* 200*l.* and upwards. A deed of gift, a will, a bargain and sale, a lease and release, and a deed-poll, importing

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importing to be in execution of some power in the said articles on marriage, which, though of different dates, were all executed at the same time, before the same witnesses, thereby to dispose of all his real and personal estate to appellant; and immediately, on *Owen's* death, appellant possessed himself of his personal estate, 400*l.* and upwards; and *Owen Wynne*, Esq. as heir at law to *Owen's* father, entered upon the real estate, claiming the same by virtue of a remainder in the father's will, which title is yet litigated between him and appellant. And that respondent *Anwill*, afterwards married *Jane*, and they exhibited their said bill for a specific execution of the marriage articles; and defendants having severally answered, *Owen Wynne*, Esq. insisted on his title to part of the premises of the yearly value of 36*l.* and that the said rent charge of 35*l.* could not affect the same. And appellant insisted, that other part of the deceased's real estate was subject to other incumbrances prior to the marriage covenants; and that all the real estate was but of the yearly value of thirty-one pounds, and that the title was then litigated between appellant and defendant *Wynne*, who was in possession; and the cause being at issue, witnesses were examined on both sides, whereby it appeared, that the title of the real estate was controverted, and that the personal estate of the covenantor *Owen*, in appellant's hands, amounted to 400*l.* and upwards. And the said cause being heard, it was decreed, and further decreed, as stated by the appellants.

To be relieved against which decree, appellant first brought a bill in the Court of Chancery, at *Westminster*, in nature of an appeal, and pending that suit, brought the present appeal; so that the respondents are twice prosecuted at the same time, for one and the same thing. And respondents further stated, that *Owen Wynne*, the husband, was a wilful conceited man, and easily imposed upon; and there was not any proof in the cause of disobedience in the respondent *Jane* towards him, nor any proof tending to taint her virtue or chastity; and that the reason of lodgings respondents demands upon the personal estate, in the first place, was because the real estate, which was upon the marriage treaty represented to be 70*l. per ann.* was not really competent to answer the annuity of 35*l.* and because the title of the real estate is litigated by a title paramount the husband's.

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Die Veneris, 24^o *Februarii*, 1698. After hearing council upon this appeal, it was ORDERED and ADJUDGED by the Lords, That the appeal be dismissed with 20*l.* costs against appellant. *Lords Journ.* vol. xvi. 389.

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William Warr, Gentleman, - Appellant.

John Præd, - - Respondent.

THE appellant stated, that in 1680, appellant and Case 12.

Daniel Gates sent the ship *Old African*, (whereof Called in he was sole owner) with great sums of money and the Lord's effects to *Zante* and the *Morea*, to bring home a cargo last adjudication of currants for his account, and consigned her to respondent, then living at *Zante*, who accordingly bought *Daniel Gates* a cargo of currants, and laded the ship therewith, and consigned her back to *Gates*, and, in 1681, sent an account under respondent's own hand, wherein he acknowledged himself satisfied for the cargo; and, about 1682, respondent came into *England*, and *Gates* was for seven years after alive, and in very good reputation and ability; and respondent did not, during his lifetime, pretend to, or make any demand of any money for the said currants; but within that time borrowed of *Gates*, divers sums of money, and gave notes under his hand for so much received and borrowed, viz. 12th *December*, 1682, 25*l.* and 23d *January*, 5*l.* and 23d *March*, 1683, 20*l.* but *Gates* having died in 1689, respondent, several years after his death, exhibited his bill in Chancery against appellant and *Agnes Gates*, widow and administratrix of *Daniel*, for an account of the said currants; which bill, the defendants answered, and plaintiff replied, and examined witnesses, and hurried his cause to hearing before defendants had examined any witnesses; and 5th *December*, 1691, obtained a decree, that it should be referred to Sir *John Franklyn*, a Master, to take an account of what was due to plaintiff for the currants in question, and that defendants should pay the same; and defendants were to have a commission to examine as occasion should be. And defendants, 25th *February*, 1691, moved

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moved the then Lords Commissioners, for a commission to examine witnesses at *Venice, Zant*, and the *Morea*; but the same was denied, notwithstanding the decree, and though the alledged debt was contracted, and the money paid there, and the prime costs of the currants could not otherwise appear; and from that decree, appellant appealed to the Lords, and the said decree was affirmed 27th *January*, 1692. And the Master, 17th *January*, 1693, reported 6404*l*. 9*s*. 7*d*. due to respondent for principal and interest, but without sufficient proof to warrant the report, and without taking notice of the account under respondent's own hand, though proved in the cause; wherefore exceptions were taken to the said report, and the cause heard thereon 20th *April*, 1694, before the Lord Chancellor; who, on inspecting the said account under respondent's own hand, declared, he did not see sufficient cause to confirm the report, and therefore sent it back to the Master, to make a further report upon the whole matter; but respondent having, without procuring any further report, petitioned the Court, that the exceptions might be reheard; the same were reheard 24th *July*, 1696, when the Chancellor ordered, that a commission should issue out beyond sea for better clearing the account before the Master, and that respondent should join therein within a fortnight, or defendants to take a commission *ex parte*. And respondent accordingly joined in commission; but to prevent defendants having any fruit thereof, soon after petitioned the Lord Chancellor, to discharge the order for a commission; and thereupon, and on reading said order, made by the Lords, 27th *January*, 1692, the Lord Chancellor, 21st *January*, 1696, discharged the order for a commission; and further ordered, that respondent should apply by petition, to have a day appointed for re-arguing the exceptions, and that the defendants should be at liberty to petition the House of Lords, to explain their order of the 27th *January*, 1692. To prevent which application, respondent, within a week after, obtained an order for re-hearing the exceptions, and the Chancellor thereupon confirmed the report; and further ordered, that it should be referred back to the Master, to carry on the interest from the time of his report, and to tax respondent his costs of suit. Appellant admitted himself accountable to respondent for the cargo of currants, according to the Lords former order, and did not endeavour to alter the decree thereby affirmed; but insisted,

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ed, that it did not appear by proofs in the cause, that any sum remained due to respondent for the currants; and that if appellant could have had an issue at law, directed by Chancery, to prove the payment, or a commission to examine his witnesses, respondents whole demand for the currants, would have appeared fully satisfied; and therefore appellant hoped the House would reverse the decretal order, or direct an issue to be tried at law, or would explain their former order about a commission; T. Dyosé, and appellant subjoined the following account, which he relied upon as evidence of payment for the currants, freighted by the ship the *African*;

Mr. DANIEL GATES, Dr.

1680.			
Augst.	To freight, $\frac{1}{2}$ per cent. on the cequeens 310, which were received <i>per contra</i> ,	3	84
January.	To cost & charges of 116 butts, 66 carratels, and 50 rolls of <i>Nathaligo</i> currants, <i>la per den</i> , on the ship <i>African</i> , as per factory,	19684	36
June.	To <i>Cambio</i> at 3 per cent. on the <i>per contra</i> dollars, 6000, drew for <i>Venetia</i> , <i>per</i>	180	00
	To provision and bro. of decto, at $\frac{3}{4}$ per cent. <i>per</i>	45	00
	To <i>Cambio</i> , at 3 per cent. on the <i>per contra</i> balance and 2277 71, drawn for <i>Venetia</i> ,	65	00
	To provision and bro. at 3 per son, do. <i>per</i>	16	82
		19995	54

Per Contra Cr.

Augst. By cequeens 310, received of ship *Unity*, from Mr. *Williams*, of *Venetia*, *per*

775 60

By

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By dollars received from Captain <i>Waters</i> , - - - per		1100	00
By dollars 9842 18 embarked me of Mr. <i>Wm. Warr</i> , for $\frac{1}{2}$ part of the ship <i>African</i> , cargo of currants, as per <i>contra</i> in and 19684 36 is - dollars,		9842	18
1681. June.	By dollars 9242, drawn on Mr. <i>Gates</i> , via <i>Venetia</i> , by Mr. <i>Williams and partner</i> , - - -	6000	00
July.	By balance thereof, which I draw on you, via <i>Venetia</i> , per Mr. <i>Williams and partner</i> , - - -	2277	71
<i>Zant</i> ,		19995	54

5th July, 1681.

JOHN PRÆD.

The respondent made this case: That appellant joined with *Bonnell* of *London*, merchant, (to whom respondent had been apprentice) to send respondent as their factor to *Zant*, in company of Mr. *Pendarves*, then consul of the *Morea*; and, in 1680, *Daniel Gates*, and appellant, sent respondent a separate commission, to buy up all the *Natbalico* and *Morea* currants, or so much as the ship *African* could carry; and ordered respondent to draw bills for the money on their correspondents *Williams* and *Anselme*, at *Venice*, and that respondent should have 8 per cent. commission; and respondent accordingly laded the ship with currants, which cost about 4000*l.* sterling, and thereupon drew bills on the correspondents at *Venice*, for about 20,000 dollars, and confiding in the honesty and orders of *Gates* and appellant, suffered the ship to depart for *England* with the currants, and forwarded an account, and therein gave credit for all the money so drawn for at *Venice*, (errors excepted;) but the appellant and *Gates* sent orders to *Williams* and partner, not to accept respondent's bills, which were all protested; so that the money remained still due as much as if

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no such credit had been given; and the ship arrived safe with the currants; and appellant being so possessed thereof, and designing never to pay for them, appellant (as was fully proved in the cause in chancery) wrote to one *Taverner* (who had formerly been his apprentice, and then lived in the house with respondent at *Zant*;) to do respondent all the prejudice he could, and prevent the payment of this money, and *Taverner*, by appellant's order and approbation, endeavoured to take away respondent's life; and for that purpose made himself a pair of shoes of a hat, to go softly to cut respondent's throat as he slept in bed; but his heart failing him, he hired five ruffians to murder respondent, who having, by good accident, been often diverted from executing the bloody purpose, two of them repented, and discovered the truth to respondent, (and were both afterwards shot to death for the same;) and respondent, on this discovery, going to *Taverner's* apartment, found he was run away with respondent's cash, books and papers (to the value of 30,000 dollars) amongst which were the protested bills from *Venice*; and respondent was forced to fly to *England* to save his life; and being there incapable for want of his books and papers, to sue for his said just debt, and under extreme necessities for money for his subsistence, *Gates* took the advantage thereof, and made the respondent give him a note for 50*l.* as borrowed; and respondent was forced to retire into the country for several years, till appellant in *Trinity* term, 1689, had brought his bill in the Exchequer against *Gates*, for an account and share of the currants aforesaid. And *Gates* having answered, appellant was decreed his share, and an account accordingly; whereupon respondent, in *Trinity* term, 1690, brought his bill in Chancery against appellant and *Agnes Gates*, widow and administratrix of *Daniel Gates*, for an account and satisfaction for the Currants aforesaid, and they having answered, appellant denied he was partner with *Gates* in the said currants; and several witnesses being examined, the cause was heard, 5th *December*, 1691, and on reading the proofs, and the proceedings in the Exchequer, (there being an order for that purpose) the court was satisfied that appellant was partner with *Gates* for the currants, and that they ought to account to respondent for the same, and referred it to the master, as stated by appellant; and the master having been several times attended by both sides,

1698. } sides, on the charge and discharge, the Court was moved, 25th *February*, 1691, and council for appellant and *Gates* were fully heard, as to having a commission to examine beyond seas, and the court then declared that there was no cause for either party to have a commission in taking the account, on which the master accordingly proceeded, and appellant and *Gates* exhibited several interrogatories, on which respondent was examined, and fully answered the same on oath, and proved the whole money due; and several witnesses were examined before the master, and the particular price, and the buying up of the currants fully proved; and *Anselme*, one of the correspondents at *Venice* was also examined before the master both on appellant's and respondent's part, and could not prove one penny paid for those currants, but said that there was a free commission sent to respondent in particular, to buy up a cargo of currants, and that no money was remitted or paid respondent on that particular account, by him or his partner *Williams*; but that several sums were remitted by them to *Pendarves* and respondent as partners, upon their joint account, in relation to other concerns: and the master being ready to make his report, appellant, in *January*, 1692, preferred his petition and appeal to the Lords, alleging that the cargo had been paid for by money and effects sent by the very same ship, and complaining that the decree was very unjust, and also that the said order of the 25th of *February*, whereby they were to have no commission, was unjust, and prayed a reversal: To which appeal respondent put in his answer, and upon hearing council on both sides, 27th of *January*, 1692, the said appeal was dismissed with 20*l.* costs, and the decree affirmed; and thereupon the Master *Journ. ubi* made his report, 17th of *January*, 1693, and certified due to respondent for ready money by him paid for the currants, and interest to the time of hearing, 6404*l.* 9*s.* 7*d.* which report was duly confirmed upon full debate: And respondent having sued a sequestration thereon, appellant fraudulently conveyed away his estate, and *Agnis Gates* ran away with her effects, and appellant brought a second appeal to the Lords for the same purpose, with his former appeal, which respondent insisted ought to be dismissed, because the account insisted on by appellant as a receipt for the price of the currants, is no more than an account current, saving errors, and the bills, for which respondent therein gave credit, not being paid, but afterwards

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afterwards protested the money was still due to the respondent, as if no such credit given; and if this account had been, as pretended, a stated account, appellants could have produced receipts for the money, and also respondents letters, wherein he must have acknowledged the receipt thereof; and *Anselme*, who was the man that must have remitted the money, swore no money was paid; and for appellant's suggestion, that money and effects, sufficient were sent by the ship to buy up the currants, the commander who carried her over, had been examined, and proved only 1100 Dollars sent with the ship, for which they have credit; and as to the objection that respondent had given a note, under his hand, to *Gates* for 50*l.* as borrowed and received, it was proved in the cause, that *Gates* took advantage of the necessity respondent was reduced to at his coming to *England*, and made respondent give such note before he would part with the money; therefore it is no argument of respondent's being paid, especially after the many shifts and evasions used in this cause. And it was proved in the cause, that appellant had often confessed the abuses aforesaid, and the aforesaid money to be due, and declared he was not the only man who had wronged respondents, and that all he had in the world, and putting his hand to his throat said, and this too shall be at your service to make you satisfaction; and as to the objection that a commission to examine abroad was denied, that order was particularly complained against in the former appeal and affirmed, and the appeal dismissed with costs; and though appellant and *Gates* had an order for a commission, before the hearing in Chancery, and respondent joined therein, yet they never sent the same away, but kept it by them above half a year; and on hearing the former appeal, the Lords were satisfied of the proofs, and would not grant appellants any commission; and the present appeal being for the same effect and purpose with the former appeal, respondent hoped that this appeal would likewise be dismissed with cost.

Die Martis. 28^o Februarii, 1698. After hearing council on the petition and appeal of *William Warr*, from an order of the Court of Chancery, in a cause between *John Prad*, complainant and petitioner, and *Agnes Yates*, widow and administratrix of *Daniel Yates*, defendants, praying a reversal of that order, or that petitioner might be relieved by explaining an order of the

the Lords.
It is *Gates*
in the for-
mer order

William Spry.

1698. { the Lords of the * 27th of January, 1696, it was ORDERED and ADJUDGED, by the Lords, that the petition and appeal be dismissed, and the order complained of affirmed.

* This is an error in the Journal book; there is no order of the Lords in this cause of that day, the date intended is the 27th January, 1692.

Christopher Digbton, - Plaintiff, } In Error.
Bernard Grenville, - Defendant, }

Case 13. **T**HE writ of error was brought to reverse a judgment, given in the Court of King's Bench, in a cause in ejectment, wherein *Digbton*, on the demise of the Earls of *Huntingdon* and *Scarisdale*, was plaintiff, and *Grenville*, defendant; and the plaintiff in error made this case: That the said Earls were seized in possession of the manor of *Marr*, and divers lands and tenements in *Marr*, in the county of *York*, in right of their wives, daughters and co-heirs of Sir *John Lewis*, deceased, who had purchased the same from *Thomas Lewis*: defendant, under colour of an extent on an old statute, evicted the Earls; who thereupon brought their ejectment, which was tried at the King's Bench bar, *Easter* Term, 1683, and the jury found a special verdict to this effect: That *Thomas Lewis*, 9th April, 20 Jac. I. 1622, acknowledged a statute of 1200. to *William Knight*; afterwards, 20th November, 13 Car. I. 1637, another of 1000l. to *Richard Gerrard*; and afterwards, 27th May, 15 Car. I. 1639, another of 5000l. to Sir *Jervase Elwaies* and *Richard Burroughs*; and that execution was sued out upon all these statutes, and the premises in question extended; and that the estates and interests of *Knight* and *Gerrard*, under said extents, were, 5th July, 1655, assigned to *Edward Lewis*; and that *Thomas Lewis*, being in actual possession, afterwards, 26th May, 1657, for 4000l. sold the premises to Sir *John Lewis*, and, in Trinity, 1657, levied a fine with proclamations thereof to him; and that *John Lewis*, by will, devised the premises to his brother *Edward Lewis*, and the heirs males of his body; and for want of such issue, to his the said *John Lewis*.

Lewis's daughters, (afterwards married to the lessors of the plaintiff;) and that *John Lewis* died, and the premises then, and at the time of the making the said will, were in the possession of *Edward Lewis*; and that *Edward Lewis* being in actual possession, he, in *Michaëmas Term*, 23 *Car. II.* 1671, levied a fine with proclamations, the last proclamation being 11th *June*, 24 *Car. II.* 1672, which was to the use of himself and his heirs, and died without issue; whereby the premises descended to the daughters of *John Lewis*, (who were also heirs to *Edward*) who entered, and were seized; and marrying the said Earls, they entered, and were seized in right of their wives. And that, 20th *July*, 1680, administration to *Burroughs*, the surviving connusee of the 500*l.* statute, was committed to *Anne*, wife of the defendant *Grenville*, as to that statute, and the extent thereon; and that *Grenville's* wife was also administratrix of *Gerrard* the second connusee, and she and her husband, 31st *July*, 32 *Car. II.* 1680, acknowledged satisfaction on that statute, which was thereupon vacated; and that defendant, in right of his wife, administratrix to *Burroughs*, 28th *September*, 34 *Car. II.* 1682, entered upon the said Earls into the Premises, and was possessed.

This special verdict was several times argued, and in *Easter Term*, 1688, 4 *Jac. II.* judgment was given by the then Chief Justice *Wright* for defendant; and the Earls thereupon brought a writ of error in the Exchequer Chamber, where the matter was many times argued; and in *Trinity Term*, 1690, the judgment of the King's Bench was reversed by the opinions of six Judges, namely, Chief Justice *Pollexfen*, Chief Baron *Atkins*, Justices *Ventris* and *Rokeby*, Baron *Lechmere*, and Baron *Turton*, against two, namely, Justice *Powell*, (deceased) and Justice *Nevill*; and thereupon the Earls went back into the King's Bench to have execution of the judgment pronounced in the Exchequer Chamber, which the Judges refused to award, by reason of an alleged mistake in the writ of error; the writ saying, (*because in the record and process, and also in giving judgment of a plaintiff which was before THE LATE KING CHARLES;*) whereas it should have said, (*because in the record and process of a plaintiff which was before THE LATE KING CHARLES, and in giving judgment on the same PLAINT BEFORE THE KING*

1698.

See his argument at large 2 Vent. 321.

1698. { KING JAMES;) the action being brought in King Charles's time, and the judgment given in King James's: And upon this the Earls were forced to bring a new writ of error, whereon the judgment of the King's Bench was afterwards affirmed for Mr. *Grenville* in the Exchequer Chamber; there being three Judges for reversing, to wit. Justice *Rokeby*, Baron *Lechmere*, and Baron *Turton*, and three for affirming, namely, the Chief Justice *Treby*, Justice *Nevill*, and Justice *Powell*; so that a majority being required to reverse the judgment, it was of course to stand: Sir *Robert Atkins*, whose opinion was with the Earls, having a few days before surrendered his place. And plaintiffs stated, that the question, which arose upon this special verdict was, whether the estate and interest, by the extent on the 5000*l.* statute, was barred by the fine levied by *Edward Lewis*, and five years non claim? for that the interests of the extents on *Knight's* and *Gerrard's* statutes, being vested in *Edward Lewis*, and the inheritance afterwards coming to him, the estates, by virtue of those extents, were drowned in the inheritance, and extinguished by the fine which he levied; and the extent on the 5000*l.* statute, claimed by *Grenville*, coming to take place when the extent on the two former prior statutes were removed, and no claim nor entry being made, by virtue of the last extent, within five years after the fine, the interest by that extent was, as insisted upon, thereby absolutely barred, in order (as plaintiff stated) to remedy which Mrs. *Grenville* procured letters of administration to herself of *Gerrard's* personal estate, and then acknowledged satisfaction of his statute; the interest whereof, it was contended, was long before drowned and extinguished, and thereby pretended to get a new right to enter into the premises, by virtue of the extent on the 5000*l.* statute; and whether Mrs. *Grenville* should have five years more to make her claim, after her own acknowledging satisfaction on *Gerrard's* statute, which had, as was alleged, been discharged before by the extent being drowned in the inheritance, was, as plaintiff contended, the main question in this cause; but plaintiff insisted that Mrs. *Grenville* could not, by the acknowledging satisfaction on *Gerrard's* statute, gain any new right to enter to avoid the fine above nine years before, inasmuch as an entry might, and then should have been made into the extended estate. And plaintiff contended, that the contrary opinion

opinion would tend much to weaken the security of a fine and non-claim; and that it would be of pernicious consequence to purchasers and owners of estates, if such old dormant incumbrances could be at any time set up against a fine and non-claim, and so supported by vouching a statute, the interest of which was long before extinguished; and that if so, estates might be incumbered which had been long enjoyed without interruption.

1698.

B. Shower
Ed. Not-

The defendant, in support of the judgment, stated, that *Thomas Lewis* was seized, and acknowledged the three statutes upon each of which the premises were extended; and that the executor of *Knights*, the connusee of the first statute, and the executor of *Gerrard*, the connusee of the second statute, assigned over their estate and extended interests unto *Edward Lewis*; and that *Thomas Lewis*, the consufor, by deed, 25th and 26th May, 1657, conveyed the premises to *John Lewis* and his heirs, and levied a fine with proclamations to him: and that *John Lewis* devised to the said *Edward*, as stated by plaintiff; and that *Edward*, after *John*'s death, levied a fine, and died without issue; and that thereupon the Earls of *Huntingdon* and *Scarfsdale*, in right of their Ladies, entered upon the premises; and that *Anne*, the wife of the defendant *Grenville*, obtained administration of *Burroughs* and *Gerrard*, and, with defendant her husband, entered satisfaction on *Gerrard*'s statute, and afterwards entered under the extent on the statute to *Elwaies* and *Burroughs*; and that thereupon the Earls, in plaintiff's name, in *Hillary*, 34 and 35 Car. II. brought an ejectment in the King's Bench against the defendant *Bernard Grenville*; and that, after a long trial at bar, a special verdict was found, and very often solemnly argued, and judgment given for defendant; and that afterwards a writ of error was brought in the Exchequer Chamber, and there, after many solemn arguments, the former judgment in the Court of King's Bench affirmed; and that to reverse these two judgments, the plaintiff brought a writ of error in the House of Lords; and that the only thing insisted upon by plaintiff's part was, that defendant's extended interest on *Elwaies* and *Burroughs*'s statute for 5000*l.* was barred, either by the fine levied by *Thomas*, or by the fine levied by *Edward Lewis*, and five years non-claim after these fines. Defendant insisted that the judgments

given

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{ 1698. }
 given were well warranted by law, because the extended interest upon *Knight's* statute, being the first statute, was merged by being assigned over to the same person to whom *Gerrard's* extent on the second statute was assigned; and that the extent on *Gerrard's* statute, being a reversion, or at least in nature of a reversionary interest, drowned and merged the extent upon *Knight's* statute, which was an interest for years in possession. And defendant insisted, that the fine levied by *Thomas Lewis*, who was but tenant at will, with reversion in fee expectant on the three several extents, operated only upon the reversion in fee, and did not divest the extended interest upon the respective statutes of *Gerrard* and *Burroughs*; and that consequently, five years non-claim did not bar those extents. And further, that the fine, afterwards levied by *Edward Lewis*, he being possessed of the extended interest upon *Gerrard's* statute, with a reversion of *Burroughs's* upon his extent, with reversion in tail to the said *Edward Lewis*, operated as a forfeiture of *Gerrard's* extent, of which, though *Burroughs* might immediately have taken advantage, he was not compellable to do so; and, admitting *Gerrard's* extent was barred by the fine of *Thomas Lewis*, and five years non-claim, yet as to *Burroughs*, and all strangers, the right had existence in law; and that it was not necessary to make any claim upon *Burroughs's* statute until *Gerrard's* statute appeared satisfied on record, and defendant making his claim by entry, within five years after satisfaction entered upon record on *Gerrard's* statute, was sufficient to prevent *Burroughs's* extent from being barred by the fine. And further insisted, that this case did not differ in reason from the common and known case: *A.* tenant for life, remainder in fee to *B.* disfeised; disseisor levies a fine, and there is five years non-claim, though the estate of tenant for life be barred, and the remainderman may enter upon the five years non-claim by tenant for life, yet he may waive such entry, and shall have a new five years after the death of the tenant for life to make his claim. So in the principal case, though *Burroughs* might, had he so pleased, have entered upon the five years non-claim by *Gerrard*, yet he might stay till *Gerrard's* estate, which stood in his way, was spent, and expect, till satisfaction was entered upon the record of *Gerrard's* statute; for as the death of tenant for life, is the proper and natural determination of an estate for life, so the entering satisfaction

faction upon record is the proper and natural determination of an extent upon a statute; and in the one case as well as the other, before such determination, the remainderman, or reversioner, is not compellable to make his claim to avoid the fine.

That this was a cause of great legal expectation, appears by numerous books in which it is detailed, and by the time and solemnity with which it was determined 1698. 247. 2 by the Lords; for the Chief Justice of the King's Bench Vent. 321. brought up the writ of error to the Lords, 6th *March*, 1 Show. 1698. *Monday*, 13th *March*, defendant, in error, was 36. Comb. ordered to join issue by *Thursday* next, and that day, 50. 77. 16th *March*, the Lords appointed *Wednesday* next to 229. hear Council argue the errors; and, 20th *March*, on 158. Skin. defendant's petition, appointed the argument for *Friday*, 383. Holt. and no other business to intervene. And, on that day, 197. 31st *March*, after hearing Council to argue the errors, Viner. ix. ordered that the Lord Chief Justice of the Common 328. 339. Pleas (who that day sat Speaker) should report to the 21. 6. 293. House what was offered thereupon, on *Thursday* the 20th 262. of *April* next, and that all the twelve Judges should 277. 282. then attend the House: And on that day the report was 296. xv. further adjourned to *Monday* next, and ordered that all 362. xvi. the Judges in town do then attend, and all the Lords 502. xviii. to be summoned; and on that day, 24th *April*, ordered 298. xia. that the report be made on *Thursday* next, all the Judges 218. 552. to attend, and all the Lords to be summoned; and, 566. 570. *Die Fevis*, 27th *April*, 1699, upon report of what was offered by Council the *one-and-twentieth* of *March* last, So it is in to argue the errors assigned upon a writ of error brought the print- into this House the 6th day of *March* last, from his ed Jour- Majesty's Court of King's Bench, wherein judgment is nals, but entered for *Bernard Grenville*, Esq; and afterwards it is an affirmed in the Exchequer Chamber, against *Christopher* error for *Dighton*; and after hearing the Judges, and due con- the 31st, sideration of the case, It was ORDERED and ADJUDGED nothing having been done by the Lords, that the judgment given in the King's in this Bench, and the affirmation thereof in the Exchequer Chamber, be affirmed, and the record remanded. *Lords* cause on *Journ.* vol. xvi. p. 395. 399. 406. 407. 429. 444. 448. the 21st. 454.

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1699.
}

Philip Owen, Esq. - - Plaintiff } in Error.
Robert Saunders, Gent. - Defendant }

Case 14.

THE writ of error was brought to reverse a judgment given in the King's Bench, for reversing a judgment given in the Common Pleas, in an assize of novel disseisin, for the office of Clerk of the Peace for the county of *Kent*; and the plaintiff *Owen*, made this case: That by an act made 1st *William* and *Mary*, intituled, An act for enabling Lords Commissioners for the Great Seal, to execute the office of Lord Chancellor, or Lord Keeper, it was (*inter alia*) enacted, That the Custos Rotulorum, or other person to whom of right it should belong, to nominate or appoint the Clerk of the Peace for any county, &c. should, from time to time, where the office of Clerk of the Peace should be void, nominate and appoint one able and sufficient person residing in the county, for which he is so appointed or to be appointed Clerk of the Peace, to execute the same by himself, or his sufficient deputy; and to take and receive the fees, profits and perquisites thereof, for so long time only as such Clerk of the Peace should well demean himself in the said office. And that 15th *July*, 1689, *Heneage*, Earl of *Winchelsea*, then Custos Rotulorum of said county, nominated and appointed *Owen* to the office of Clerk of the Peace for said county, then vacant; he, *Owen*, being a person skilled in the law, and fit and sufficient to execute said office, and then and yet residing at *Maidstone*, in said county; and that thereupon he, on that day, was sworn and admitted into said office, and held and enjoyed the same, and well behaved himself therein; and was thereof seized in his demesne as his freehold, for the term of his life, until the defendant disseized him of his said office at *Maidstone* aforesaid, and prayed the assize might be taken.

Defendant pleaded, that *Owen* was never seized of the office of such estate whereof he might be disseized, and thereupon issue was joined. And 23d *July*, 1695, the assize was taken in the county of *Kent*, and a special verdict found, whereby the jury found the act of Parliament, and that their Majesties, by their letters patent,

1699.

12th *July*, 1689, appointed the Earl of *Winchelsea* Custos Rotulorum of the county; and that the Earl the same day, by writing under his hand and seal, nominated and appointed *Owen* to be Clerk of the Peace of the said county, and to receive the fees and perquisites belonging to said office during the pleasure of the said Earl; and, that at the General Quarter Sessions held at *Maidstone*, 15th *July*, 1689, the said writing of nomination was shewed to the Justices of the Peace, and read; and a question arising between the Justices, touching the validity of the said writing, the Justices refused to admit *Owen* into said office by virtue thereof, though requested thereunto by *Owen*. And that at the same Quarter Sessions held by adjournment at the Castle of *Canterbury*, the 23d of said month of *July*, the said Earl, then Custos Rotulorum for the county, came into Court, and the said writing was by his order read in open Court, and the said Earl, then in open Quarter Sessions, (without reference to the said writing) *vice voce*, said and declared, I do nominate and appoint the said *Philip Owen* to be Clerk of the Peace, according to the act of parliament: and *Owen* was thereupon, by the justices, accordingly admitted, and then, in open sessions, took the oath in the said act mentioned, and took upon him the execution of the office, and held and enjoyed the same, with the wages and fees thereunto belonging, until the 7th of *October* next following; and found further, that the Earl of *Winchelsea* died 25th *August*, 1689, and the 26th of *September* following, their Majesties, by their letters patent, appointed Henry Viscount *Sidney*, then Earl of *Rumney*, *Custos Rotulorum* of said county, who, by writing under his hand and seal, the 29th of *September*, aforesaid, appointed defendant to be Clerk of the Peace of the said county, who, at the next general quarter sessions of the peace held for the said county, the 7th of *October* following, took the oath in the act mentioned in open sessions, and was admitted Clerk of the Peace, and held the said office, with the wages and fees, from thence until the taking of the said assize, and kept *Owen* out of the said office, and received the wages and fees; but whether he disseized *Owen* of the said office or not the jury were ignorant, and prayed the direction of the justices of assize; and if *Saunders* disseized *Owen*, then they found the disseisin, and assessed damages to 275*l.* besides costs; and if he did not disseize *Owen*, then they found for the defendant:

1699. { defendant: And the plaintiff stated to the Lords, that the only question intended by the special verdict was, whether the *Custos Rotulorum* could appoint the clerk of the peace by word of mouth, or whether a deed was requisite to make the appointment upon the act of parliament; and after several arguments, and great debates in the Court of Common Pleas, whether the matter was adjourned, judgment was given, that a nomination by word of mouth was good; from which judgment *Saunders*'s brought his writ of error in the King's Bench; and after many arguments, the Court, as the plaintiff alleged, agreed with the Court of Common Pleas, that a verbal nomination is good; but because the late Earl did not in his appointment name the county of *Kent*, but only said, I do nominate Mr. *Owen* to be clerk of the peace, not saying for what county; and because the said Earl did not expressly name any one act of parliament, but only said, that he nominated the plaintiff according to the Act of Parliament; and because in the nomination, the Earl did not say how to execute, nor how long; and also, because in the said Earl's nomination the word *said* was used, which is with relation to one named before, whereas the Earl had not before named *Philip Owen*; therefore who he meant was said to be incertain; and thereupon, for these and no other reasons, the judgment given for *Owen* in the Common Pleas was reversed; but plaintiff insisted that the judgment given in the King's Bench ought to be reversed; for that the Earl could not possibly intend, or by any person be supposed to intend, any other county than *Kent*, he being then *Custos Rotulorum* of that and no other county, and where he was then present, and speak the words; neither could he intend any other act than the late act of parliament, which was the matter then in dispute, and what he purposely came about, neither could he intend any other person than *Owen*, on whose behalf he came, and on whose account he ordered the deed wherein he was so often mentioned, to be read immediately before he, the Earl, declared *Owen* to be his Clerk of the Peace, by the words of nomination before mentioned.

Thomas
Powers.
Edward
Northey.

The defendant, in support of the judgment of the King's Bench, stated, that in 1695, almost six years after defendant had been in possession of the office, the assize was begun in the county of *Kent*, before the
Judge

{ 1699. }

Judge of Assize there, and that a special verdict was given as stated by defendant; and upon the argument before three judges there, two of the judges were for the plaintiff, and one for defendant; upon which judgment was given for plaintiff. And that upon the argument of the writ of error brought into the King's Bench, all the four judges there gave judgment for the reversal of the judgment in the Common Pleas; and defendant insisted, that the judgment given in the King's Bench, ought to be affirmed, because this office was made a freehold by the late act, or otherwise a writ of assize would not lie; and that the deputation of the plaintiff, by the Earl of *Winchelsea* in writing, was void, being contrary to the late act, which expressly appoints the Clerk of the Peace to hold so long as he shall well demean himself; and plaintiff's written deputation being only during the Earl's pleasure; and contended, that all offices of freehold (except such as have been time out of mind, or by custom) must pass by deed, and that Clerks of the Peace, before and since the late act, have been appointed by deed, and not otherwise. And further, that if a grant, or other title, be found in a special verdict by deed, and also by parole from the same person, and at the same time, the words must be understood according to the sense and meaning of the deed, and should not be taken to destroy the deed; and moreover, that the parole nomination was not pursuant to the act, the same being uncertain, and not in the manner as such nominations are (if allowable by word of mouth) ought to be.

N. Wright.
B. Shows.

Die Lune, 30 April, 1699^a, after hearing council Vid. 5 upon this writ of error, it was ORDERED and ADJUDGED by the Lords, That the judgment given in the King's Bench for the said *Robert Saunders*, should be reversed, and the judgment given in the Court of Common Pleas be affirmed, and the record remitted. *Lords* 426. *Comb.* 317.

NOTE—* *Owen* died within two or three days after this judgment given in Parliament.

Lilly's Ent. 278. *Lilly Aff.* 15, 75. *the Record* 89. *Vin.* iii. 420. iv. 543. xiii. 170. xiv. 30, 53, 123, 127. xvi. 129, 443. pl. 18.
* 1 Lord Raym. 166.

Ysbua

{ 1699. }

Joshua Woodman,

- - - Petitioner.

George Willoughby, and Joanna his } Respondents
wife, and Margaret Taylor,

Die Jovis, 14th January, 1691.

CASE 15. **O**N hearing council on the petition and appeal of *Lords Amy Barton, George Willoughby and Joanna his wife, and William Taylor and Margaret his wife, from* Journ. a decree of the Court of Chancery, made the 21st of Vol. XV. *March* last (1690) in certain causes there depending between *Joshua Woodman*, executor of *Frances Dennis*, widow, by bill of revive against *Robert Blake* and *Elizabeth* his wife, *Amy Barton*, widow, and *Joanna Badd* (then) the wife of *George Willoughby*, Gent. *Margaret Badd*, (then) the wife of *William Taylor*, *John Sturmy*, Gent. and *Mary* his wife, and between the said *Robert Blake* and *Elizabeth* his wife, plaintiffs, and *Thomas Sackville*, Esq. *Amy Barton*, said *Joanna* and *Margaret*, *John Sturmy* and *Mary* his wife, and said *John Woodman*, defendants; and due consideration had, it was ordered by the Lords, that the said decree of the Court of Chancery should be reversed; and *Woodman* having petitioned the Lords to rehear the appeal, the respondents (who were the original appellants) made this case: Sir *Thomas Badd* had issue five daughters, *Elizabeth Blake*, *Amy Barton*, *Frances Dennis*, *Joanna Willoughby* and *Margaret Taylor*; and by lease and releafe, 16th and 17th May, 1682, conveyed his manor of *Garnes* in *Hampshire*, to *Edward*, Earl of *Garnborough*, and *Thomas Sackville*, Esq. (both deceased) and their heirs, to the use of himself for life, remainder to Dame *Joan*, his wife, for life, remainder to the Earl, and *Sackville*, and their heirs, upon trust, that they should, after the death of Sir *Thomas* and *Joan*, sell the same, and divide the money arising thereby equally amongst the five daughters; provided, if his daughter, *Elizabeth*, should within three months next after the death of Sir *Thomas* and Dame *Joan*, pay 6000*l.* to the trustees, to be equally divided between his said other four daughters, then the trustees should stand seized to the use of her and her heirs: The like time is given for pre-emption to the other four daughters

daughters successively; and provided also, that if any of the daughters should die without issue before such division and distribution made, then her share should be paid to the survivors, share and share alike; but if such daughter, so dying, should leave issue living at the time of such distribution, then her share should be paid to such issue, share and share alike; and provided further, that Sir Thomas might, by any deed or writing under his hand and seal, revoke any of the said uses or trusts, and declare others.

Sir Thomas, by his will, 11th December, 1682, devised all his copyhold estate to the same trustees and their heirs, and reciting the settlement, appointed, that if his daughter, *Frances Dennis*, should, within six months after his and his wife's death, pay 6000*l.* to the trustees, to be divided amongst his other four daughters, then the trustees should stand seized as well of the premises in the deed, as of the copyhold estate, to the use of Mrs. *Dennis* and her heirs; and in case of her failing to pay the 6000*l.* then to such uses as he had settled his manor of *Carnes* by the said deed, and made his wife his sole executrix, and soon after died; and 30th May, 1688, Lady *Badd* died, and 29th November, 1688, Mrs. *Dennis* exhibited a bill in Chancery against *Sackville* (the surviving trustee) and her sisters, to have her time for paying the 6000*l.* enlarged; and Mrs. *Blake* also preferred her bill, to have a conveyance of the premises upon payment of the 6000*l.* but neither paid any part thereof; and in March, 1689, Mrs. *Dennis* died without issue, having (as is pretended) made a will, and devised all her estate to *Woodman*, and made him her sole executor, who revived her bill; and 21st March, 1690, both causes were heard before the Lords commissioners of the great seal, and it was decreed, that *Woodman* should be let into the benefit of the estate on payment of 1500*l.* a piece to the four surviving daughters, by the end of *Michaelmas* Term then next; but in case he did not then pay the same, the estate was decreed to be sold to the best purchaser.

From which decree the said *Amy Barton* and *William Taylor* (both since deceased) and the said *Margaret*, then his Wife, and *Willoughby* and his wife, appealed; and 14th January, 1691, upon a solemn hearing at the bar, the decree was reversed, and *Woodman* and *Blake* acquiesced

Eq. Ab.

109.

2 Vern.

166. 222.

1699. } acquiesced above seven years, in which time divers parts of the estate had been sold and conveyed to several persons by the original appellants and *Blake*; and that *Woodman* had preferred the present petition for rehearing the appeal, on pretence that some persons had supplied Mrs. *Dennis* with money, and had prevailed on *Woodman* to permit them to use his name, and that they had in his name petitioned to rehear the appeal, in order to have a fifth part of the estate in right of Mrs. *Dennis*, to pay her debts, notwithstanding she forfeited her right of pre-emption, and the rather for that, as they pretend Sir *Thomas* was indebted to Mrs. *Dennis*, for which they ought to have a satisfaction out of his estate: But respondents insisted, that all the matters of the petition were in issue on hearing of the appeal, and that Mrs. *Dennis* dying without issue long before the times given by the settlement to her sisters for pre-emption were expired, and before the trustees had any power to sell her right, as well as to any part of the money to be raised by sale as to the pre-emption was determined, and that her share upon her death, without issue, was by the express words of the settlement to be divided among her surviving sisters, and could not be taken from them without subverting the settlement, and defeating the intent of the donor; and that it had appeared by the testimony of the person who drew the deed and will (taken on *Woodman's* own part) and other evidence, that Sir *Thomas* was not indebted to Mrs. *Dennis*, but that she was indebted to him; and that the persons who prosecute the petition, did lend her any money on the credit of the settlement or will, it was done with notice that her interest was thereunder determinable upon the contingency of her death without issue, which since happened, and that such persons were not entitled to more favour in a Court of Equity than *Woodman* as devisee of Mrs. *Dennis* himself was; and further insisted, that by the decree of the Lords commissioners, the estate was to be sold, if *Woodman* did not pay the 600*l.* by the time limited; and no direction was given that he should have any share of the purchase money, but the same was in that case left to be divided amongst the four surviving daughters of Sir *Thomas Badd*, according to the settlement; and finally, that no matter was disclosed, or insisted upon by the petition, which was not before the Lords, and settled and determined upon the former hearing; and that the rehearing of appeals,

peals, especially after so long acquiescence and sales made thereupon, would be of dangerous consequence, and tends to make suits endless.

The petitioner stated the family and the settlement and will of Sir *Thomas Badd*: (but wilfully, as it seems) omitted to state the proviso relative to any daughter dying without issue; and stated further, that Sir *Thomas* died in *May*, 1683, and was at his death indebted to his daughter *Frances* 4000*l.* and upwards, which he had received out of the profits of her husband *Edward Dennis*'s estate, to whom Sir *Thomas* had been guardian for ten years; and that after Sir *Thomas*'s death *Frances* exhibited her bill in Chancery for an account of her husband's estate against Lady *Badd*, his executrix; for who having sworn in her answer, that Sir *Thomas*, by his will, gave *Frances* the pre-emption of his estate (which was more than a double share) in satisfaction of what he owed her. The court at the hearing of that cause, in consideration of such recompence, dismissed her bill, as appeared by the order of dismissal; and that *Frances*, soon after Lady *Badd*'s death, borrowed 700*l.* from a Mrs. *Mills*, and 1000*l.* from *George Sir Strensham*, Masters, and 100*l.* from *George Pitt*, Esq. and levied a fine, and mortgaged, and otherwise incumbered the estate in question, for securing the money; and that having six months to pay the 6000*l.* she applied within that time to *Thomas Sackville*, the surviving trustee, to receive the same; who answered, that he would not convey the said estate, unless he was discharged by a decree in Chancery; and refused to give any acquittance for the money; and thereupon *Frances*, within the six months, filed her bill in Chancery, to compel the trustee to convey upon payment of the 6000*l.* and praying an enlargement of time, and a place of payment; all which happening in *November*, 1688, pending the late revolution, the courts of justice were not open, and *Frances* died before she could bring that cause to a hearing; and being indebted, as aforesaid, and also indebted to *Woodman* 600*l.* by bond, and being desirous her debts should be paid, made her will, and *Woodman* executor in trust, and devised her title and interest in said estate to *Woodman* and his heirs, and appointed the said estate to be sold, and the 6000*l.* to be paid to her four sisters, and her debts and legacies to be paid, amounting to more than 4000*l.* so that *Woodman* could be no gainer thereby; and

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T. Powys.

1699. { And that, in 1689, *Woodman* exhibited his bill of revivor against the trustee and four sisters, to compel a conveyance to him on payment of the 6000*l.* and *Robert Blake*, and *Elizabeth* his wife, who was the eldest of the four sisters, exhibited their cross bill, to compel a conveyance to *Elizabeth*, on payment of 6000*l.* by her, and pretended that they had tendered the 6000*l.* to the trustee, within three months after the first six months expired, and that *Elizabeth* ought to have preemption of the estate.

And, on hearing both causes, it was decreed, that *Woodman* should be let into the benefit of the estate; for that Mrs. *Dennis* surviving Lady *Badd*, an interest and benefit had vested in her, which could not be forfeited, though the time was elapsed for payment of the 6000*l.* and the court declared, that the default was in the trustee only, who might have had the money within the time limited, but refused to convey, unless first discharged of the trust by decree in Chancery; and further decreed, an account to be taken of the profits of the estate since Lady *Badd*'s death; and *Woodman* had time till *Michaelmas* Term to pay 1500*l.* a piece to the sisters; and they and the trustee thereupon to convey to him, and in default of payment the estate to be sold; which decree the Lords barely reversed, without making any decree or further order therein: and petitioner insisted, that said *Frances* was entitled both under the settlements and will to a fifth part of the estate, in case she failed to pay the said 6000*l.* and submitted that, although by the reversal the benefit of pre-emption was taken away from *Woodman* as a stranger to the family, yet their Lordships did not intend thereby to take away from the creditors of *Frances* her fifth part of her father's estate, which descended upon her, and which she had mortgaged and incumbered before her death, and by her will had subjected to the payment of her debts, for which he alleged he was prosecuted in Chancery, and that by means of the order of reversal the Chancery could not without the direction of the Lords, give any relief to the creditors of *Frances* out of her own estate, nor could the estate be sold without the Lords further order; and prayed to explain the order of reversal, and to make some order for relief of the creditors of *Frances*, or to give directions to the Court of Chancery how to proceed therein.

W. Whitlocke.

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Die Mercurii, 19^o Aprilis, 1699. Upon hearing council on both sides on this petition, it was ORDERED and ADJUDGED by the Lords that the same be dismissed. —*Lords Journ.* Vol. xvi. 442.

1699.
Viner v.
93, 342.

Elizabeth Harvey, - - - Appellant.
Thomas Western, - - - Respondent.

APPELLANT stated, that *Charles Harvey*, Case 16. her father (who was a freeman of *London*) and respondent were partners in a great iron trade, wherein their first principal stock was only 600*l.* of which one third part being 200*l.* was *Harvey's*, and the other two thirds respondent's, and that by an account stated and signed between them, 1st *March*, 1670, it appears that the 600*l.* stock had, in seven years trade, encreased to 35,028*l.* of which 500*l.* was then esteemed doubtful debts; so that *Charles Harvey's* share was then 11,670*l.* and soon after that account made up, *Charles* and respondent, by articles, dated 31st *July*, 1671, entered into a new partnership to continue for ten years longer, to commence from 1st *March*, 1670; and it was thereby agreed, that the whole balance of the last stated account, together with 7488*l.* borrowed on their joint credit, in all above 42,500*l.* should be employed to carry on the succeeding trade, and that an account and dividend of the partable estate should be yearly made; and if either died no advantage of survivorship, but within six weeks a true account should be given, and dividend made between the survivor and the executors of the deceased, and what was not presently dividable to be valued, and as soon as might be converted into money, and divided; and any differences to be ended by arbitrators, indifferently to be chosen; and that, pursuant to these articles, the joint trade was carried on with a stock of 42,500*l.* and they traded with 11000*l.* borrowed in *Charles Harvey's* life-time, from 1st of *March*, 1670, to 28th of *October*, 1672; when *Charles Harvey* died, leaving appellant his only child, then about six years old, having made a will, and appointed *Elizabeth* his wife, (since married to Mr. *Chadwike*) sole executrix, and

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and thereupon two-thirds of his estate belonged to his widow, and the remaining third to appellant, his only child, by the custom of *London*; and the whole partnership estate and books, it being possessed by respondent, the widow could not for twelve weeks after testator's death obtain from him any account at all, and that which was at length delivered, 26th *January*, 1672, was found so intricate, immethodical, erroneous, and unfair, that no certain estimate could be thereby made of the partable estate; and respondent refused to deliver any other, or to produce the books, and threatened to ruin the widow with expensive suits, who found herself under a necessity of accepting what he offered, namely, to refer the matter on the foot of said erroneous account, to two arbitrators, *Thomas Bard* and *John Boun*; one of them a country gentleman, wholly unskilled in accounts of that nature; who, 2d *June*, 1673, (without regard to the balance of the account stated, 1st *March*, 1670, or taking a true account of the profits from that time to testator's death, or of the true value of the stock then remaining, and outstanding debts, made an award, whereby the widow was to accept of 6000*l.* in money, and an assignment of 1000*l.* more from the ordinance office (which, by the respondent's misinformation, she was afterwards prevailed upon to part with to him, for 500*l.* and thereupon to quit all her interest and demands to the whole estate in partnership; and accordingly she inconsiderately, and by imposition, submitted to the award, and executed a release of all her right to the respondent; but that appellant was then an infant, and had no guardian, or person who took any care of her interest in the partable estate to her father's share, in which she was intitled to one third, and the award of the arbitrators could not conclude the infant, but the mother only, as to her own share and proportion: Appellant did not come of age till 1687, and her estate being got into the chamber of *London*, she was not apprised of her right, nor in a condition to prosecute it, until about eight years after she was of full age; but as soon as she was informed thereof, viz. in *Trinity* term, 1695, she exhibited a bill for an account, and satisfaction of her share of the said estate in partnership; and in bar to the relief sought by this bill, respondent pleaded the statute of limitations, and the said award made between him and appellant's mother, and the mother's release; upon arguing which plea, it was over-ruled

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10th November, 1696, and respondent ordered to answer the bill, saving to him, on the hearing, the benefit of so much of the plea as related to the award; and the respondent afterwards put in an answer, which was reported insufficient; and he answered over, and appellant replied and obtained several orders for the respondent to produce all books relating to the partnership before a master of the court; and several errors and omissions were found therein, and also in the account upon which the arbitrators grounded their award; and proof made of several of those errors and other matters sufficient, as she was advised to invalidate the account, and set aside the award; the cause was brought on to a hearing, and her bill dismissed; but the chancellor at the same time declared he thought appellant wronged by respondent, and recommended it to him to make her a satisfaction; which he neglecting, and insisting on the dismissal, and refusing to have the account examined by a master, thereby to deprive her of her share of the partnership estate; therefore she appealed from the said order of dismissal, and insisted the Lords W. Wil- ought to open the said account, and not suffer her to liams. be concluded by the award.

In affirmance of the dismiss, the respondent made this case: That *Charles Harvey*, a relation of respondent's wife, was taken by the respondent a partner in his said trade of an ironmonger, in which their stock was to be 6000*l.* two thirds being the respondent's, and one third *Harvey's*; who not being able to raise above 1100*l.* the respondent in kindness lent him 900*l.* to make up his third of the stock, and had it repaid out of his share of the profits as he could spare it; and afterwards they enlarged their trade to the making and casting of iron guns, and other iron wares: and in *March*, 1670, the partners, (as they had formerly done) for private satisfaction, cast up their stocks, and the rest then made amounted to 30,288*l.* besides 5000*l.* thrown out as bad debts owing to the stock, and the stock then owed 7488*l.* 15*s.* and being agreed to continue the joint trade with the said stock, were exact in the estimate, because whenever they parted, an account was to be taken of the whole trade and partnership from the beginning; and by articles, dated 31st *July*, 1671, agreed to keep on the joint trade for ten years, from the 1st *March*, 1670, (if they both lived so long) and accordingly carried on joint trade and

1699. and dealings in the old books till 28th October, 1672, when *Charles Harvey* died; after which respondent, with the consent of *Elizabeth Harvey*, executrix of *Charles*, caused extracts and accounts of the said joint stock and estate to be taken by *Thomas Harvey*, (the appellant's uncle, and who had served an apprenticeship to the said joint trade, and kept the cash, and managed the trade for the copartners in *Harvey's* last sickness,) and *Edmund Harvey* (another of the appellant's uncles) an experienced tradesman and good accountant; and all the goods and wares then in stock were, by consent of the respondent and the executrix, appraised by them, and with the debts owing to and by the stock, (5000*l.* being thrown out as bad debts) the neat stock was 23,671*l.* but the executrix obstructed the closing the said account, insisting that the copartnership was not determined by her testator's death, but she ought to be partner in his stead: And differences thereupon arising between respondent and the executrix, they, pursuant to the articles, referred all matters in difference to *John Boun* (the executrix's brother-in-law) and *Thomas Bard* (the appellant's near kinsman) who was then an iron-master; with whom said extract was left as a true account admitted by both parties; and all the partnership books were laid before them, and examined with the extract; and the executrix and appellant's two uncles, on her and her said mother's behalf, managed the reference before the arbitrators; who on full information, 2d June, 1673, made their award in writing, and awarded respondent to pay the executrix (over and above 1000*l.* which she had drawn out of the stock before) 5100*l.* at two payments, and secure the same by respondent's bonds; and to assign her a third of a debt of 3000*l.* owing for royal ordnance, and save her harmless from all debts owing by the stock, and that respondent should enjoy the rest of the estate; and that respondent and the executrix should release each other: pursuant to which award, respondent secured to the executrix the 5100*l.* by two bonds; and afterwards by indenture, dated 12th June, 1673, for a final end of all differences, and in consideration of 1000*l.* paid her, and 5100*l.* secured to her as aforesaid, and the third part of the 3000*l.* debt, owing for royal ordnance, assigned to her; the said executrix assigned and released to respondent all other wares, debts and things belonging to the partnership, and all actions and demands whatsoever relating to the partnership; and

and the respondent, by another part of that indenture, in like manner, released the said executrix.

That respondent afterwards, with the executrix's consent, sold the 3000*l.* debt for 1500*l.* and paid her 500*l.* her third thereof; and also the said 5100*l.* in discharge of his bonds; and all rested in peace, till about *Michaelmas* Term, 1695, when the appellant exhibited her bill in Chancery, alleging divers errors, omissions, and under-valuations in said account, and that the partnership books had been withholden, and not laid before the arbitrators, whereby they were misguided to award the executrix less than her due share, (being, as alleged, one third of 30,028*l.*) and that the appellant being but six years old, and an orphan of the city of *London*, when the award was made, no act of executrix could bind her: And respondent having pleaded the statute of limitations, the award made, the several great sums paid in performance thereof, and the releases given above twenty years before the bill filed, which was not exhibited till near ten years after appellant had attained her age of 21 years, the court over-ruled the plea of the statute, and ordered the respondent to answer the bill; but reserved the benefit of the said plea as to the award till the hearing of the cause. And respondent afterwards fully answered, and denied the whole equity of the bill, and produced all the partnership books before Sir *John Franklyn*, a master of the said court, where appellant had free access by herself and agents, to inspect and take copies of what she thought fit; to which end she employed two accountants, *de die in diem*, for several months before the hearing. And after examination of witnesses, the cause came to be heard; and then, upon appellant's producing an affidavit, that several books, or accounts, relating to the partnership iron-works in *Sussex*, were in the respondent's clerk's hands there, in *Sussex*, and not produced before the master, (although they afterwards appeared to be loose accounts kept by the clerks for their own discharge, and immaterial as to making up the account of the said joint stock) respondent was ordered to produce upon oath what duplicates he had of them before the master, and was examined upon interrogatories touching the same; and the court then gave appellant six or seven weeks time to reduce her objections to the account in writing, and to deliver them to the respondent, that he might

1699. } might be provided to answer them at the hearing. And a paper of thirteen several objections, or errors, were accordingly delivered to the respondent; and the cause coming to be further heard (all books being brought into court) appellant endeavoured to support her supposed errors, and and was heard by her council to five or six of them, one after the other, but was not able to make out any one of them; and the court declaring they would go through with them, appellant and her council declined so doing; wherefore the court having heard the depositions of witnesses on both sides read, and the cause having received a full hearing, over-ruled the objections, and dismissed the bill, but without costs; forasmuch as the court conceived the appellant had been misguided by the misinformation of her mother: and respondent shewed, that whereas it was objected that the sums awarded are less in proportion than her share of 30,028*l.* being the rest in *March*, 1670, which may be supposed to be much increased in the twenty months *Charles Harvey* afterwards lived, that the rest, or estimate of the 1st *March*, 1670, was made up of goods and debts; and the goods valued at a selling price, and that many of the debts then reckoned good, proved bad; and that it appears by the books, that *Charles Harvey*, after the 1st *March*, 1670, drew out 2439*l.* 14*s.* 6*d.* and then respondent must draw out double that sum, both which amounted to 7319*l.* 3*s.* 6*d.* and that peace being concluded with the Dutch after the first of *March*, 1670, all the iron guns and shot, and materials for war-commodities, fell to half the price, and lessened the stock exceedingly, and that all this appeared in proof in the cause; and that it would be hard, after an account thus stated, an award made and performed, and mutual releases given, and twenty-five years acquiescence under them to lay open the account, no gross error or mistake appearing therein, and all due care having been taken by appellant's mother and uncles, to settle the account for her and her mother's advantage.

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Die Veneris, 28^o *Aprilis*, 1699. After hearing council on this appeal, it was ORDERED and ADJUDGED by the Lords, that the decree of dismissal complained of, should be affirmed. *Lords Journ.* vol. xvi. p. 456.

Philip

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Philip Doughty, Esq. - - Appellant.

Thomas Cotton, Esq. and Philadelphia his wife, and Edward Doughty, } Respondents.

THE appellant made this case: That by articles, dated 25th *August*, 1679, he agreed to sell the manor of *Esbar*, *Wayland's* farm, and other lands in *Surry*, to Sir *Thomas Lynch*, (*Philadelphia's* late father) and his heirs, for 10,500*l.* to be paid at several days; and further agreed, that *Edward Doughty* his brother, who was then in possession of *Wayland's* farm, and other part of lands, should take a lease thereof from Sir *Thomas* for ten years, from 29th *September*, 1680, at 24*5l.* rent; for payment whereof appellant should be bound with his brother, in a penal bond of 2000*l.* and conveyances were made accordingly, and 4500*l.* part of the purchase money paid, and the land mortgaged back to secure 6000*l.* and interest, which, according to Sir *Thomas's* account, was at *Michaelmas*, 1681, reduced to 5000*l.* and that 29th *April*, 1686, the lease was made to *Edward Doughty*, and he and appellant entered into the 2000*l.* bond, and *Edward* gave appellant an indemnity bond of 4000*l.* and afterwards, Sir *Thomas Lynch* being desirous to preserve his timber and woods, agreed to allow for plow-boot and other boots during the lease, 14*l.* a year; which was accordingly allowed in the account of the first year's rent, made up between Sir *Thomas* and *Edward*; upon which account there rested due to *Edward* 1*l.* 12*s.* and that Sir *Thomas* having taken into his hand a mill, part of his purchase, for improving of it, the river *Esbar* was for several years afterwards raised so high above the usual mark, that it overflowed, and dammed *Edward Doughty's* farm 50*l.* a year at least; that soon after Sir *Thomas* began his voyage to *Jamaica*, of which place he was appointed governor; and 31st *October*, 1681, being at *Plymouth*, on his way towards *Jamaica*, wrote a letter to appellant, that he had given Mr. *Duck*, his agent, instructions to pay appellant 15*5l.* a year out of his *Esbar* rents, to make up the interest of the 5000*l.* and if appellant wished to have an order for receiving *Edward's* rent, as well as *Duck's* 155*l.* per annum,

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annum, he desired appellant to send to him any paper he pleased, and he would sign it. And 18th November, 1681, he sent a note to appellant to receive only 14*s*l. out of *Edward Doughty's* rent, and afterwards died at *Jamaica*, leaving *Philadelphus*, his sole daughter and heir, a minor. And that contests and suits afterwards arose about the administration and her guardianship, which continued till July, 1691, before which time the lease expired, so that no account was stated, nor allowances made for the boots, damages, nor taxes, or could any legal discharge be given for the rent: And in September, 1684, *Edward Doughty* continuing in possession, assigned the premises to *John Gosling*: And afterwards the Earl of *Torrington*, who was some time *Philadelphus's* guardian, held great part of the farm for many years under articles from *Gosling*, who died in 1693. And appellant never was in possession of the farm after the sale, except that he hired some few closes from *Gosling* for keeping his horses during King *Jane's* camp at *Hounslow*: And, 17th August, 1686, appellant being desirous of having his money paid, and to be discharged of the 200*l*. bond, his brother having assigned his interest to *Gosling*, wrote a letter to one of *Philadelphus's* agents for paying off his mortgage monies, and that he expected to be freed from any further concern relating to the farm. And, 4th June, 1687, *Philadelphus*, by *Charles Herbert*, Esq. her next friend, exhibited her bill in Chancery against appellant to redeem the mortgage, to which bill *Edward Doughty* and others were made parties; and it was charged, that it was agreed between Sir *Thomas* and appellant that *Edward's* rent should be discounted out of the interest of the mortgage; which bill appellant answered, and denied any such agreement; and the cause abated by the intermarriage of respondents in January, 1689. And 3d June, 1692, respondents, by Sir *Robert Cotton*, their next friend, brought their bill of revivor against appellant and others; and appellant exhibited his cross bill to be paid his mortgage monies, and to have allowance for several goods left by him with Sir *Thomas Lynch* at the sale of the estate: And, 6th December, 1694, both causes were heard; and it was decreed that the Master should take an account of what was due from respondents to appellant, and compute interest for the principal money to be found due on the mortgage, and tax appellant his costs in respect of the said mortgage; which

which principal interest and costs were decreed to be paid to appellant at such time and place as the Master should appoint; but no order was made, or direction given for discounting the rent out of, or against the interest of the mortgage money; which decree was afterwards duly signed and enrolled: And, 13th November, 1696, the Master reported 7664*l.* 10*s.* 9*d.* due to appellant on the mortgage, and appointed the same to be paid 26th day of the same November. But the Master further took on him to certify this special matter, viz. that respondents, *Cottons*, insisted that appellant being bound with his brother in the 2000*l.* bond, the rent ought to be applied towards sinking the interest of the mortgage, although *Edward Doughty*, who was made a party to the original bill, did not answer, nor was he in any manner a party at the hearing; and respondents, *Cottons*, having taken exceptions to the report, the same, together with the special matter, came to be heard, 10th March, 1696, and it was referred back to the Master to certify how long *Edward Doughty* held the farm, what rent appellant had, or without his wilful default might have received out of the farm; and that the same should be brought into the account towards discharging appellant's interest money: And, 27th July, 1697, the Master made his second report, that *Edward* held the farm till September, 1684, and that he suffered damage by stoppage of the water above the usual mark for the use of the mills 50*l.* a year, and that *Edward* assigned to *Gosling*, who held the same as agent to appellant, and leased part to the Earl of Torrington at 50*l.* a year, and that there was due to the respondents for nine years, without deductions for taxes, boots, &c. 2205*l.* and that respondent *Philadelphia* had before her marriage held part of the farm: To which report both appellant and respondents took exceptions, and appellant having obtained an order for re-hearing the special matter of the former report, the same, together with the exceptions, came on to be heard 10th March, 1697; and it was ordered that the appellant should stand in the place of *Edward*, and be allowed such deductions only as *Edward* was to have by the lease, and that the rent should be applied to sink the interest. And *Edward Doughty* being liable to appellant by the counter bond of 4000*l.* exhibited his bill in Chancery against respondents, the Earl of Torrington and appellant; to which the appellant and respondents

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respondents answered, but the Earl never answered. This cause was heard, and the Court declared it was plain that *Edward* was only a nominal plaintiff, and his name used by appellant to bring about the account again, and the respondents then offering to take no advantage of the 2000*l.* bond against *Edward*, it was ordered that all proceedings at law against *Edward* upon that bond be stayed till after the account taken in the other cause, and the Master was to tax the respondents their costs of that suit, to be paid by appellant, and respondents to have liberty to make use of *Edward*'s name for recovery thereof; and decreed a perpetual injunction to stay appellant's proceedings against *Edward* on the 4000*l.* bond. And from the several orders, decrees, and proceedings, (since the decree of 6th December, 1694) as being erroneous, and against equity, appellant appealed to the Lords, and insisted that the order that appellant should stand in the place of *Edward*, and that the rent, after all deductions according to the lease, should be applied to sink the interest of the mortgage, altered the decree of the 6th December, 1694, in its very substance without a re-hearing of the cause, and after the decree was signed and inrolled; and if a decree, duly signed and inrolled, may be varied by such a mean, it may be varied *toties quoties*, and would infringe the Lord's jurisdiction in appeals: And appellant insisted that the alteration in the decree was against equity, there being no proof that the appellant agreed that the rent should be applied to sink the interest, and the Court at the hearing made no decree or order for that purpose, though it was expressly in issue, and particularly insisted on by respondent: And though appellant were to be charged with the rent in default of *Edward*, yet he was not to answer the rent otherwise than as a security, and the account for that ought to be taken separately, and not introduced into the mortgage account, no more than the money due to appellant for goods left to Sir *Thomas* at the time of the sale, which was decreed to appellant, but ordered not to be brought into the mortgage account. And appellant further objected, that there was no order or direction for his being allowed (though ordered to stand in *Edward*'s place) the 14*l.* a year in lieu of the boots, nor for losses by overflowing of the river, nor for any allowance for the time the Earl of *Torrington* and *Philadelphia* herself possessed considerable parts of the farm. And that appel-

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{ 1699 }

ant ought not to have been decreed to pay respondent's costs in *Edward's* cause; for that *Edward* owned the suit brought in his name; which suit was moreover just against the respondents, *Cottens*, to have allowances for the boots, &c. and to be relieved against the 2000*l.* bond. And insisted that a perpetual injunction ought not to have been decreed to restrain appellant from proceedings against *Edward*, on the counter-bond of 4000*l.* when it appearing *Edward* held the land till he assigned to *Gossing* in 1684, and no proof that he ever paid a penny rent to appellant, nor that appellant was indemnified by *Edward* against the rent; and that, as the account was decreed to be taken, respondents, *Cottens*, would not only have the rent but interest for it, though the interest of the mortgage money would not be reduced to the principal monies, but would continue dead near ten years together, the rent (if allowed) and other payments not answering the interest to the appellant for so long time. And lastly, that respondents, *Cottens*, had been the occasion of these suits, by not bringing *P. Bowet, Edward* to a hearing, though originally made a party, John or adjusting their separate account with him for the Squibb. rent.

The respondents on the other hand shewed, that about *October*, 1681, on Sir *Thomas's* being appointed Governor of *Jamaica*, he stated an account with appellant, and paid him then and several times before 1360*l.* part of the principal money due on the mortgage, and that at *Michaelmas*, 1681, 5000*l.* only was due, towards sinking the interest of which sum, the rent of the said farm was to go, and that this appeared by a receipt and letter under appellant's own hand; and that respondents having filed their said bill against appellant, appellant exhibited his cross bill to open the stated account, and to foreclose the equity of redemption. And it was on hearing both causes decreed, that appellant should be at liberty to falsify the account, and it was referred to Sir *Lacon William Child* to take the account; and if any difficulty arose the Master was to report specially; and that the Master took the account, and certified the matter touching the rent of the farm specially: On arguing which, and on appellant's then alleging that respondents had for some time possession of some part of the farm, it was ordered back to the said Master to examine how long respondents, or *Edward Doughty*, appellant's brother,

1699. brother, or one *John Gosling*, were in possession, and of what part; and the rent of the farm was to be applied to sink the interest due on the mortgage; and the Master certified that *Edward* and *Gosling* were in possession of the said farm during the term of said lease; and nine years rent (2205*l.*) due to respondents, but did not then apply same towards sinking the interest. And appellant petitioned the Chancellor to rehear the special matter touching the rent; and on the re-hearing, it was ordered that appellant should stand in the place of *Edward* his brother, who it appeared was only a servant or agent under appellant; and that the rent of the said farm, after all allowance according to the said lease, should go in discharge of the interest of the said mortgage. And that respondents endeavoured to procure the Master's report, and the Master was several times attended; but appellant, for delay, and to create expence, procured a bill to be exhibited by *Edward* against respondents, and appellant himself to be made a defendant thereto, which the respondents answered, and witnesses were examined; and the causes coming to be heard, 1st *March*, 1698, the Chancellor, before he would deliver his opinion, ordered that it should be referred to the Master to examine, at whose instance that bill was brought and carried on; and the parties and solicitor to be examined on interrogatories before the Master, and the cause was to stand for further direction: And the parties and solicitor being accordingly examined, and the cause coming to be heard, 3d *March*, 1698, the Chancellor, upon hearing the examinations read, declared it was plain that *Edward* was only a nominal person, and his name made use of by appellant to bring about the account again in the other causes; and thereupon ordered and decreed as appellant hath shewed; which order and decree respondents insisted ought to be affirmed, because the re-hearing of the special matter of the report was brought on at appellant's request; and it appeared by appellant's own letter, dated 17th *August*, 1686, that he was persuaded by Sir *Thomas Lynce* to accept of a lease of the said farm for securing the due payment of his interest money; and also appellant's receipt, dated 24th *April*, 1682, was read, for 27*l.* 10*s.* which, with 122*l.* 10*s.* being half a year's rent of the said farm, (then due) was in full for half a year's interest of the said mortgage of 500*l.* due *Lady Day*, 1682. And because it manifestly

sestly appeared *Edward* was only a nominal plaintiff, and that that suit was contrived by appellant to unravel matters formerly settled in the other causes; and because it also appeared that the Earl of *Torrington* was never guardian to respondent *Philadelphus*, nor ever had any concern with her, and that Sir *Robert Cotton*, respondent's father and guardian, had paid *Gosling*, by appellant's order, the rent due for the part held by her; and that no proof was made to entitle appellant or his brother *Wm. Dobyns* to any other allowances, respondents insisted the appeal should be dismissed with costs.

Die Mercurii, 3 *Maii*, 1699. After hearing council on this petition and appeal, it was ORDERED and ADJUDGED by the Lords, that the appeal should be dismissed, and the several decrees, orders, and proceedings complained of affirmed. *Lords Journ.* vol. xvi. p. 462.

John Olabury, Merchant, - - Appellant.

Owen Wynne, Gentleman, - Respondent.

THE appellant shewed, that about *May*, 1692, Case 18.

Ellen, a scrivener, being to advance 500*l.* to Dr. *Triplet* on a mortgage of ground rents in *London*, applied to respondent (his client) to lend it, who pretended to be then out of cash; but told *Ellan*, if he could get any person to advance the money for the present, respondent expected money in a month, and would then advance the 500*l.* and take an assignment of the mortgage to himself; and that *Ellan* thereupon applied to appellant, who at first refused, but at *Ellan*'s importunity, and telling him if he advanced 300*l.* respondent would lend 200*l.* and appellant should take the mortgage in his own name, and respondent would in a month take an assignment, and repay appellant the 300*l.* with the interest again; appellant, in kindness to *Ellan*, consented to lend the 500*l.* and that thereupon *Ellan* received 200*l.* from respondent, for which he gave his own receipt as part of the 500*l.* to be advanced upon the mortgage; but respondent, who was altogether a stranger

{ 1699. } stranger to appellant, never appeared in the business, but left it entirely to *Ellan*, and appellant never gave any note or other engagement for the 200*l*. And about 1st May, 1692, *Ellan* paid *Triplet* 200*l*. and the appellant paid him 300*l*. and took a mortgage from *Triplet* in his own name for 500*l*. and in about two months after appellant called on *Ellan* to get respondent to pay the 300*l*. and take an assignment of the mortgage, who, after frivolous excuses, at length told him respondent's mind was altered, but he (*Ellan*) would get some other person; and accordingly, 4th October, 1692, procured one *Atkinson*, who paid 500*l*. and took an assignment of the mortgage from appellant, and then *Ellan* desired the appellant to pay him the 200*l*. for respondent, which the appellant refused, unless by a written order from respondent; and *Ellan* desiring appellant to write such an order as would satisfy him, appellant wrote an order in these words: "Mr. *Oldbury*, seeing I do not proceed " to take off the mortgage Mr. *Triplet* made to you " as I intended, I pray pay the 200*l*. formerly advanced thereupon to Mr. *James Ellan* for my use, " whose receipt shall be your discharge. Witness my " hand the 5th October, 1692." Which order was afterwards signed by respondent, and attested by *Ellan*; and thereupon appellant immediately paid the 200*l*. to *Ellan* for respondent's use, and *Ellan* gave his receipt for it at the foot of said order, viz. "Received the 200*l*. " above mentioned. *J. Ellan*." And appellant immediately made an entry of the payment of 200*l*. in his books of account accordingly, and heard no more of this matter till about April, 1693, when respondent had caused *Ellan* to be arrested for this and other money, and had obtained judgment against him for 700*l*. and taken his goods in execution; and then the respondent called on appellant to know at what time he paid *Ellan* the 200*l*. and desired to see his receipt, which appellant shewed him under his own order, of which he took a copy, and went away fully satisfied. And in Trinity Term, 1696, respondent filed a bill in Chancery against appellant and *Ellan*, charging a confederacy and contrivance to cheat respondent of the 200*l*. pretending that although he had given appellant an order to pay it to *Ellan*, yet that order was surreptitiously obtained by *Ellan*, and that appellant did not really pay the money, but either discounted a debt *Ellan* owed appellant, or if he did pay it, received it back immediately for his own use,

{ 1699. }

use, or that appellant suspected *Ellan's* fidelity, and should not have paid the money notwithstanding the order, and prayed to be relieved against appellant for this 200*l.* Appellant answered, and swore he really and *bona fide* paid the 200*l.* to *Ellan* for respondent's use, and did not know or remember he discounted any debt due to himself, nor that he received back any part of the money, and denied all contrivance or combination to defraud respondent, or that he mistrusted *Ellan*; but it being transacted four years before, could not remember in what specie he paid it, having taken no other notice of it in his books than that it was actually paid; and appellant submitted that if all merchants, who could not after four years tell in what specie they paid their debts, should be obliged to pay them over again, it would occasion the greatest loss that ever happened on the Exchange of London, and that if in any way of trade one man should be obliged to declare what suspicion he may have of another, it would be of very dangerous consequence, and men would be undone by relating that of others which they could not prove, and the others by having that related of them which is not true. And shewed that *Ellan* continued in his house and business near eighteen months after he received the 200*l.* from appellant, and that respondent having *Ellan* under execution, *Ellan* and he combined to put this 200*l.* on appellant, and to make him pay it over again; for which end respondent never compelled *Ellan* to answer his bill; but about twelve months after appellant had answered respondent, struck *Ellan* out as a defendant, and examined him as a witness, who through favour to respondent, and to clear himself, swore appellant paid him no money at all; but that being indebted to him, and so in his power, he was forced to give him a receipt for the money though not received; but *Ellan* shewed no circumstance of any debt due by him to appellant, nor any writing under appellant's hand, so that appellant insisted this deposition of *Ellan* had no probability or colour of truth; and supposing *Ellan* admitted to be read as witness, (which appellant insisted he ought not, he evidently swearing to discharge himself) yet little credit ought to be given to his testimony, and that there was no proof of any fraud or contrivance save by *Ellan's* deposition. And appellant shewed further, that respondent had all along trusted *Ellan*, and when the order was brought to respondent

1599. { to sign, to empower *Ellan* to receive the 200*l.* no constraint was used to him, and he had thought fit to trust *Ellan* to receive the money.

The cause was heard 11th *February*, 1697, before Mr. Justice *Turton*, (the Lord Chancellor being then indisposed) and respondents council strongly urged that *Ellan's* depositions might be read, which was denied; Justice *Turton* observing, that what *Ellan* was said to swear was contrary to his own receipt, and tended to discharge himself, not only from the 200*l.* but also from respondent's judgment and execution against him, and that he had sworn himself guilty of a very great fraud; and if such evidence were allowed it would be a great obstruction to all trade, and no man would be safe in the payment of his debts; and thereupon Mr. Justice *Turton* decreed for the appellant, and dismissed the bill with costs. But respondent petitioned the Lord Chancellor for a re-hearing, which was granted, and the cause was accordingly re-heard 1st *June*, 1698, and his Lordship permitting *Ellan's* deposition to be read, reversed the former decree, and decreed that appellant should pay respondent so much of the 200*l.* with interest, since *May*, 1692, as respondent had not received from *Ellan*, together with costs, which will amount to above 350*l.* and that appellant should be at liberty to sue *Ellan* in respondent's name, giving security to save him harmless. That some of appellant's council being absent at the last hearing, he was advised to petition for a re-hearing, which was granted; and the 14th *November*, 1698, the Chancellor confirmed his former decree against appellant. From both which decrees, and all the proceeding, appellant appealed, and prayed that both the last decrees might be reversed, and the decree pronounced by Mr. Justice *Turton* affirmed.

Con.
Phipps.

The respondent in affirmance of the last decree stated, that appellant had 500*l.* due to him on a mortgage of Dr. *Triplett's* estate, and commissioned *James Ellan*, his scrivener, to get some body to lend that sum upon an assignment of the mortgage, and that *Ellan* applied to respondent, and respondent agreed, in case the title should be approved of, and actually delivered to *Ellan* a goldsmith's note for 200*l.* (in part of the 500*l.*) which was to be repaid in case the title was not approved of; and this note for 200*l.* *Ellan* delivered to appellant, who received

1699.

ceived the money upon it; and that respondent's council not approving of the security, respondent demanded the 200*l.* back, but was amused, from time to time, about six months. And appellant having great sums of money owing to him from *Ellan*, which he suspected *Ellan* was unable to pay, contrived with *Ellan* to retain respondent's 200*l.* for so much of *Ellan*'s debt, and to get a colourable discharge from respondent; in order to which fraud appellant refused to send respondent any bill on a goldsmith as respondent had desired, but with his own hand wrote the artful note or order stated by appellant, and instructed *Ellan* to tell respondent that he, appellant, disliked the method proposed, and rather than trouble any goldsmith therein, desired respondent to sign that note, and he would pay the money down; and when *Ellan*, with these pretences, had prevailed with respondent to sign the note, appellant procured *Ellan* to sign a receipt under the said order as if he had actually received the said 200*l.* for respondent's use; whereas in truth appellant paid not one penny to *Ellan*, but retained the 200*l.* towards satisfaction of *Ellan*'s debt to him. And *Ellan* soon afterwards absconded, and the appellant insisting that he had paid the 200*l.* to *Ellan*, respondent followed *Ellan*, but could never get more of him than 1*l.* 10*s.* in part of interest, and sued him to judgment. This fraud lay concealed for about three years; but as soon as the respondent discovered it he brought his bill in Chancery, and on the first hearing before Justice *Turton* the bill was dismissed with costs, *Ellan*'s depositions not being suffered to be read. But upon a re-hearing before the Lord Chancellor, respondent's council insisted that *Ellan* stood indifferent between the parties, and could neither gain nor lose by the cause; it being all one to him whether he should be debtor to one or the other, and was therefore a good witness; and that *Ellan*'s evidence was confirmed by appellant's answer, he confessing that *Ellan* did tell him that respondent desired appellant to send him a goldsmith's note or bill of exchange for the 200*l.* and that the appellant replied he would have no goldsmith's note, nor should a bill lie out against him, and that appellant wrote the artful note aforesaid with his own hand; besides appellant's answer was falsified by two witnesses besides *Ellan*, in that part; for it was proved by these two witnesses that he did at that time transact his great payments by goldsmith's notes; but in that method

method he could not have effected his intended fraud. And appellant in his answer to that part of the bill, which pressed him to discover how, when, and where he paid the 200*l.* to *Ellan*, artfully said he paid the 200*l.* to *Ellan*, but how, whether all in money, or by a goldsmith's or other notes, or whether at home or at a goldsmith's, or at a scrivener's, or where, or how, could not tell. And appellant insisted that *Ellan* being no more than a servant or messenger in this case, his receipt without having the 200*l.* actually paid him, did not discharge respondent's debt; wherefore, and for other good reasons, the Lord Chancellor allowed *Ellan*'s depositions to be read, and declared that appellant ought to pay respondent; and decreed, as stated by appellant; which decree was confirmed on a re-hearing solicited by appellant, and the Master reported 355*l.* 6*s.* 11*d.* due to respondent for principal, interest, and costs; which decree respondents insisted was just and reasonable, and gave relief against a new invented and dangerous fraud, and ought to be affirmed by the Lords.

T. Powys.

Die Martis * 13^o *Januarii*, 1698. Upon hearing council on this appeal, it was ORDERED and ADJUDGED by the Lords, that the same should be dismissed, and the decrees and orders complained of affirmed. *Lord Journ.* vol. xvi. p. 370.

* It is 13^o Jan. in the printed Journal, but it is an error for the 31st; the date before being 30^o Jan. and the day following 1^o Feb. 1698.

Reginall

{ 1700. }

Reginald Bretland, and Robert }
Fowle, Executors of Sir Thomas } Petitioners.
Fowle, - - - - - }

v. ante.

Jonathan Cope, William Cope, and } Respondents.
Anthony Cope, - - - - - }

THE petitioners stated a decree heretofore obtained against them, and that it was thereby amongst other things ordered, that the Master should tax the respondents, the guardians, their costs; in which decree the petitioners acquiesce: And that respondent *Jonathan* had an estate of 800*l. per ann.* in possession, and 3000*l. per ann.* in reversion, sufficient to answer the guardians their costs; and that respondent *William* had 76*l. per ann.* and respondent *Anthony* 50*l. per ann.* in possession, besides 200*l. per ann.* or thereabouts, a-piece in annuities, after the death of Sir *John Cope*; and that the guardians, to load appellants, had inrolled the decree, and taxed their costs between themselves, and served appellants with a subpoena for same; and took out an attachment against them for non-payment, although appellants are not, as they insisted, decreed to pay the costs so ordered to be taxed; and that upon appellant's motion to the Lord Keeper, 13th *July* last, complaining herein, his Lordship would not deliver any opinion therein, but directed appellants to apply to the Lords to explain the decretal order as to costs. And appellants insisted that there did not appear any wilful breach of trust in them, and that they had acted only according to the opinion of council; and that the Chancellor looked upon respondents demands not clear or plain, but, on the contrary, that the matter was disputable and doubtful, and the cause was three days at hearing. And the court did not, as appellants insisted, intend the executors should pay any costs, otherwise it would have been expressly so declared; and that the money decreed to respondents was abundantly more than sufficient to reimburse the guardians their costs; and that the appellants apprehending they were not ordered to pay the costs, never attended the taxing thereof, but the same were taxed *ex parte*; and therefore

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fore appellants hoped the Lords would not add to the decree, by ordering them to pay the said costs.

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W. Dobyns.

The respondents on the other hand insisted, that the court had directed the Master to tax the respondents, the guardians, their costs, and that decree was affirmed by the Lords; and that petitioners had in no sort performed the decree though it had been inrolled, and they served with a writ of execution thereof; and that pursuant thereto respondents costs had been taxed by *Roger Meredith*, Esq. the Master, to 279*l.* 6*s.* 8*d.* less by 100*l.* than the guardians had really and necessarily expended in the suits, for which petitioner *Fowle* had been served with subpoenas, and an attachment for non-payment; and that upon their petition to the Lord Keeper, he declared that the decree being affirmed by the Lords, petitioners must apply there to have the order explained, and in the mean time suspended proceedings on the attachment for the costs; and respondents insisted that the costs so decreed to respondents, could not be intended to be payable by any but petitioners, who had been held guilty of a breach of trust both in the Court of Chancery and by the Lords.

Wm.

Cowper,

Rob.

Dormer.

Die Sabbati, 22^o Martii, 1700. Upon hearing counsel upon this petition, it was ORDERED and ADJUDGED by the Lords that the said *Reginald Bretland* and *Robert Fowle*, executors of the last will of Sir *Thomas Fowle*, should pay the costs by the said decree appointed to the guardians; and that the Court of Chancery should send it back to the Master to retax the costs, the same having been taxed *ex parte*. *Lords Journ.* vol. xvi. p. 631.

John

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1700.
}

John Williams, - - - Appellant.

Katherine Williams, Executrix of
Humfrey Williams, and *Elizabeth Williams* an Infant, } Respondents.

A N D

Katherine Williams, and *Elizabeth Williams,* } Appellants.

Case 20.

William Williams, *Godfrey Harcourt,* } Respondents.
Robert Rumfry, - - -

THE appellant stated that *John Williams*, his father, by his will devised to his son *William* certain lands in *Cumdey* and *Crickbowel*, county *Brecknock*, worth about 24*l. per ann.* and to his son *Henry* certain lands in *Llangenny*, worth about 100*l. per ann.* and that *Henry* was importunate to purchase his brother *William's* interest in the lands in *Cumdey* and *Crickbowel*, which *William* told him he would not sell, not being certain of his title; but *Henry* replied he knew that, and desired to purchase no more than *William* had: And that *William* thereupon agreed to sell to *Henry* all his interest in said lands for 300*l.* to be secured by a mortgage from *Henry* of his lands in *Llangenny*. And that articles of agreement, dated 12th *January*, 1682, were drawn up between them by one *Thomas Richards*, importing merely that *William* should convey all his right to his lands in *Cumdey* and *Crickbowel* to *Henry* for 300*l.* and that *Henry* should mortgage to *William* all his lands in *Llangenny* for securing the purchase money; both parts of which agreement were examined and compared, and were executed reciprocally by *Henry* and *William*; and in *William's* counterpart, the latter part thereof was written by *Henry* himself, and mutual bonds in 500*l.* penalty given for performance of them, and *William* expressly covenanted only against persons claiming under himself; and *Henry* afterwards gave the part of the articles executed by *William* to an attorney to draw conveyances, and the attorney dissuading him from going on with the purchase, intimating that it was a bad

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{ 1700. } a bad title, *Henry* replied he knew what he did, and could make his bargain easy by telling his brother *William* shop goods, *Henry* being then a mercer in *Abergavenny*. And accordingly *Henry* took a conveyance from *William* of all his interest in the lands in *Cumdy* and *Crickhowel*, and mortgaged his lands in *Llangenny* to *William* for the purchase money, and paid interest for the said 300*l.* the purchase money, and entered upon, and received the profits of the purchased estate; and *Henry* obtained a judgment by surpize on the bond for performance of covenants, and died, and afterwards *William* exhibited his bill in Chancery against respondent *Katherine*, his executrix, to be relieved against the judgment, and against the respondent *Elizabeth*, to foreclose the mortgage; which cause was heard 21st *February*, 1687, and respondents ordered to pay *William* the 300*l.* interest and costs, to be taxed by a Master, or to be foreclosed, and to go to a trial at law, how much they were damaged by breach of any of *William*'s covenants in the articles. And Mr. Pitt, the Master, having reported 564*l.* 10*s.* 6*d.* due to *William*, and *William* wanting money, appellant, his brother, supplied him with 300*l.* and took an assignment of his mortgage. After which respondents exhibited their cross bill against *William*, to set aside the purchase, on pretence that *William* had not a good title to the lands he sold. And 17th *June*, 1696, the causes came to be heard, and one part of the articles sealed by *William Williams* being produced by respondents, and there appearing therein a clause written with unusual abbreviations, and crowded in between the other lines, being a covenant by *William* that he had a good title; and there being no such article in the counterpart of the articles sealed by *Henry* to *William*, the court were ready to have decreed against the said articles; but, upon the respondent's importunity, directed an issue at law to try if the articles dated the 12th *January*, 1682, were the act and deed of *William*; which issue was tried at *Hereford* affizes 1st *July*, 1696, before Mr. Justice *Roteby*, and a verdict found for respondents; which was to contrary to the sense of the judge, that he afterwards, 16th of *November*, 1696, certified that as the evidence appeared to him. it was fit to have a new trial; but by negligence of *William Williams*'s solicitor, in not praying that the issue might be tried in another county, the same coming to be tried 30th *April*, 1697, before Mr. Justice *Samuel Eyres*, in the

the same county of *Hereford*, by a common jury, the former verdict being produced, had such influence, that the second jury gave a verdict for respondents. And the cause being heard on the equity reserved, the Lord Chancellor decreed that *William* should re-convey the mortgaged estate to the respondent *Elizabeth*, and account for the interest received of the purchase money, and to deliver up the mortgage deed, and *Elizabeth* to re-convey the purchased lands to *William* when she came of age, unless she then shewed cause to the contrary. And on a rehearing, 15th November, 1698, his Lordship confirmed the former decree, since which *William Williams* died, and administration to him was granted to appellant his brother, who insisted that the decree ought to be reversed, and causes heard upon the proofs taken therein, or that a more proper issue might be directed, and tried in some other county; because it appeared the first verdict was contrary to evidence, and so certified by the judge; and because the last verdict was found upon the very same evidence, and influenced by the credit of the first, which ought not to have been regarded when set aside as contrary to evidence; and because the original articles produced by respondents had a covenant which was not in the counterpart executed by *Henry*, which interpolated covenant appeared on inspection to be inserted after the rest of the covenants in that part of the articles, and to be the hand writing of *Thomas Richards*, who alone proved the inserting it; and lastly, because that the conveyances accepted by *Henry* from *William Williams*, Price, G. and solemnly executed, were contrary to the article so interpolated, and agreed with the counterpart of the articles as executed by *Henry*.

Rob.
Price, G.
Paunce-
fort.

The respondents, in affirmance of the decree, made this case: That *William Williams* was bred an attorney, and in possession, and pretended title to the lands in *Brecknock*, 20*l.* yearly, and knew his younger brother *Henry* to be a weak, ignorant man, and prevailed on him to purchase those lands, and agreed to pay him 300*l.* for the same, to be secured on a mortgage of the reversion of divers lands of *Henry's*, expectant on the death of his mother (then living), worth about 60*l.* *per annum*, and that articles were entered into accordingly, and mutual bonds given as stated by appellant; and a covenant in the articles that *William* should make good his estate to *Henry*, and that the conveyance and mortgage

1700.

mortgage were executed; but that the covenant in the articles for making good the estate from *William* to *Henry*, was omitted in the said *William*'s conveyance to *Henry*: And that *Henry* soon after discovered that his brother *William* had cheated him, he, *William*, not having inheritance of the estate sold by him, and *William* having so covenanted to warrant the estate, *Henry* sued *William*'s bond of 500*l.* and obtained judgment thereon in *August*, 1684, and in *October* following *Henry* died, and *William* being afterwards taken in execution upon the judgment, 26th *May*, 1686, exhibited his bill in Chancery against respondent *Katherine*, to set aside the judgment, and to foreclose the mortgage; which bill respondent answered in *Hilary*, 1686, and insisted that *William* had cheated her husband in selling said estate, which was the defendants, *Harcourt* and *Rumsey*'s inheritance, and that he had not conveyed with warranty as agreed by the articles, and offered, if *William* would re-convey the mortgaged estate to her, she would release the judgment, and re-convey *William*'s estate to him; which he refusing to do, she thereupon in her and her daughter, the infant's name, 2d *May*, 1688, exhibited a bill against *William*, *Harcourt* and *Rumsey*, to discover their title, and that *William* might execute a conveyance according to the articles, or re-convey the mortgaged estate, they being ready to re-convey to him, and thereupon to discharge the judgment, so that each should be in *statu quo*; and shewed that *Harcourt* and *Rumsey* had by their answers set forth, and had proved a good title to the purchased premises, and that *William* had no title thereto; and that *William* had by his answer confessed he had not a good title, but insisted that *Henry* knew it to be a bad title, and purchased with such notice, and that if any such covenant for warranty was in the said articles, it was inserted after they were sealed, and that he ought not to make any further assurance with general warranty; although by the articles aforesaid he had agreed to make good the estate, and had by three leases made by him to under tenants covenanted generally for quiet enjoyment, in order (as respondents supposed) to induce *Henry* to be a purchaser; and that *William*'s council insisted on the hearing, that the articles were forged: Upon which Lord *Somers*, at their request, directed the issue, and on two trials by two special juries, who knew the character and credibility of the witnesses on both sides, verdicts were found for respondent the infant,

infant, and that the articles were *William's* act and deed. And that after the second verdict upon hearing the cause on the equity reserved, *William's* council obtained four days to attend the judge for a certificate for a third trial, who refused it, declaring it was a fair verdict, and such as himself would have given had he been upon the jury. And the cause being afterwards finally heard upon the equity reserved, it was decreed that *William* should re-convey the mortgaged premises to the respondent the infant, and that she should enjoy same against *William* and all claiming under him; and that the respondents should convey to *William* the lands sold to *Henry* free from incumbrances, and that each deliver back to the other the title deeds on oath; and respondent, the executrix, to acknowledge satisfaction on the 500*l.* judgment, and the re-conveyances to be settled by a Master, and an account to be taken of what money the respondents testator paid for interest of the 300*l.* and costs on both sides were reserved until the court should see how the decree would be complied with; and the Master settled the said conveyances, and reported 36*l.* due to respondents for interest; and that appellant in the name of *William Williams* afterwards petitioned for and obtained a rehearing; and thereupon the first decree was confirmed, and ordered *William Williams* to pay costs in case he did not comply with the said decree; after which *William* died, and administration to him had been granted to appellant, who had all along managed and carried on the suits at his own charge in *William's* name, who had, in 1686, assigned his interest to appellant, as appeared by *William's* affidavit. And respondents insisted that the two decrees ought to be affirmed, and the appeal dismissed with exemplary costs; and shewed that respondents had for upwards of fourteen years been harrassed in these suits by appellant in the name of *William*, and put to above 600*l.* charge, to their utter ruin, and had for several years been kept upon the charity of their relations.

Die Lune, 24^o Martii, 1700. After hearing council upon this appeal, it was ORDERED and ADJUDGED by the Lords, that the decree and order complained of should be affirmed, and the appeal dismissed with 10*l.* cost. *Lords Journ.* vol. xvi. p. 633.

Edward,

Wm.
Dobyn.

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{ 1700. }

Edward, Earl of *Sandwich*, and
Lady Elizabeth his Wife, *John*,
 Lord Viscount *Lisbourne*, and
Lady Mallet his Wife, Right
 Honourable *Francis Greville*,
 and *Lady Ann* his Wife, } Appellants.

Edward Henry, Earl of *Litchfield*,
 Lord *Quarrendon* his eldest Son,
James Lee, Esq. and his Lord-
 ship's younger Sons, } Respondents.

Case. 21. **T**HE appellant stated, that the manor of *Adderbury*, in the county of *Oxon*, and several lands there, worth above 6000*l.* *per annum*, had been in the family of the late Earl of *Rochester* for many generations, part fee-simple, part copyhold of inheritance, and part leasehold, under the bishop of *Winchester*, for three lives, all held together without distinction of freehold, copyhold or leasehold, and that the leases as the lives dropt, were from time to time renewed by the Bishop, on easy fines, and during the late wars, when there was no possibility of renewing the bishop's leases, *Henry*, late Earl of *Rochester*, the last life therein, died in 1659, in exile, leaving *Ann*, his Countess, and *John*, Earl of *Rochester*, his only son, then about twelve years old and 1660, upon the restoration of *Charles* the 2*d*, and the bishops and their estates with him, Countess *Ann*, Earl *John*'s mother and guardian, applied to doctor *Duppa*, then bishop; and in regard of her late husband's loyalty and sufferings, and in consideration of 2000*l.* fine, (though then worth 6000*l.* if to be sold to a stranger) obtained new leases of the manor and scite of *Adderbury* for three lives, for the benefit of Earl *John*, and as any of the lives fell renewed the leases at very easy fines, for the lives of Earl *John*, his Lady, and afterwards of Earl *Charles*; and the Countess held and enjoyed the fee-simple and copyhold, as well as the said leasehold lands, and received the rents and profits from 1660, till 8th *March*, 1695, (when she died,) during the greater part of which time Earl *John*, Earl *Charles*, and the ladies of appellants, were minors; and upon her death the Earl of *Litchfield*, whose family never

1700.

never had any pretence to this estate, under some general words in her will, claimed all the fee-simple, copyhold, and leasehold premises to him, and his sons successively in tail-male; pretending that the countess *Ann*, (by supplying her husband with money during his exile) had become a purchaser of the said estates: And in 1696, Lord *Sandwich*, Lord *Lisburne*, Mr. *Greville*, and their Ladies, exhibited their bill in Chancery, to be decreed in right of their Ladies, the daughters and heirs to *John*, Earl of *Rocheſter*, and sisters and heirs to *Charles*, late Earl of *Rocheſter*, to the possession of the fee-simple and copyhold, and to have an assignment of the leasehold premises, and an account of the rents and profits to which respondents put in their answers: And on hearing the cause, 29th *June* and 22d *July*, 1700, appellants bill as to the leasehold was dismissed, and a trial at law directed to try whether any, and how much of the estate in *Adelbury* was freehold or copyhold of inheritance, belonging to Earl *Henry* at his death; and the account of the profits thereof was respited, and the possession of such parts of the leasehold as was not then in the possession of the Earl of *Litchfield* was to be delivered to him, and the rents, arrears, and growing rents thereof to be paid to him; which orders appellants insisted ought to be reversed, and the said leasehold lands decreed to them; for that they had as good right to the leasehold, as to the freehold and copyhold; and that the several renewals of the leases ought to be adjudged a trust for appellants; and that it was not in the power of the Countess, who acted as a guardian and trustee for infants, to renew to her own use, or to dispose of the premises to a stranger: and that the said leases and estates had been in the *Rocheſter* family for several generations, and held altogether in unity of possession without any distinction, and that the countess *Ann*, mother and guardian of Earl *John*, then an infant, could not, and in conscience ought not, to take advantage of the leases, being expired on the death of her husband, when in exile, and the Bishops deprived, and their estates sequestered and sold; for if guardians or trustees, when they see any thing beneficial which belongs to the infant, might, by laying down their own money, take it to their own use, the rules of justice and equity must be inverted; which are, that guardians may do any thing for the infant's advantage, but nothing to his prejudice; and by many cases and precedents in Chancery, such proceedings and attempts of

{ 1700. } of guardians have been corrected, and set aside as fraudulent; and it appeared by proofs in the cause, that the countess took, and the Bishop granted the new leases for so inconsiderable a fine as 2000*l.* (when the same was worth 6000*l.*) in consideration of Earl *Henry's* loyalty and hardship, he being his intimate friend and fellow-sufferer; and for the benefit of Earl *John*, his son, then an infant; and insisted that the Countess's enjoyment did no more give her a right to the leasehold than to the freehold and copyhold, all which she managed as guardian; and the greatest part of the time of her enjoyment was during the infancy; and appellants contended, that any money the Countess laid out in buildings had been expended on the freehold, leasehold, and copyhold, without distinction; and that all were to go one way, and not the leasehold to attract the freehold and copyhold, and that the Countess had built for her pleasure, and enjoyed the benefit of it, so long as to be sufficiently recompensed all her monies by the rents, and profits; and that she ought not, out of gratitude to one family, make a satisfaction out of the estate of the other, especially when she had only a jointure settled in consideration of a portion paid; and though the Ladies had given her general releases, yet appellants insisted those releases were only as the Countess was their guardian, and received the profits of part of the estate they had by their mother, and is so recited in those releases; wherefore appellants thought that the orders ought to be reversed as to the leasehold estates, and that the renewals should be decreed a trust for the appellants.

W. Cow-
per.
B. Show-
er.

The respondents on the other hand shewed, that *Henry*, Lord *Wilmott*, Earl of *Rocheſter*, grandfather to the Ladies, appellants, held the manor of *Adderbury* by leases for three lives from the Bishops of *Winton*, at 8*5**l.* 3*s* 4*d.* rent, and was himself the last surviving life in all the leases, and that upon his death, in 1658, his estate and interest therein absolutely determined, and that for some years before his death the premises were enjoyed by his creditors, and from his death till the restoration, by the then powers, as other church lands were. And in 1660, when the lands were restored to the church, Doctor *Duppa* being made Bishop of *Winton*, had the premises in his then present possession, and might have kept them in his own hands, or granted them to whom he would; and upon

upon application from *Ann*, Countess of *Rochester*,
 relief of *Earl Henry*, the Bishop, in consideration of
 200*l.* actually paid by her, granted new leases to her,
 for three lives, nominated by her, as a purchaser, viz. her
 own life, and the lives of *John*, Earl of *Rochester*, her
 son, by *Earl Henry*, her second husband, and of *Sir*
Francis Henry Lee, her son by *Sir Henry Lee*, her first
 husband, the Earl of *Litchfield's* grandfather; and as
 any of these lives fell, the Countess, with her own pro-
 per monies, purchased new leases, for such lives as she
 pleased; and *Earl John* died in 1680, leaving *Earl*
Charles his only son (who died without issue) and ap-
 pellants, the Ladies his daughters, having made his
 will, and *John Cary*, Esq. and others his executors; and
 the Countess quietly enjoyed from 1660 till her death, in
 1696, and having, by her bounty to *Earl John* and his
 children, contracted a considerable debt, she, by deeds
 executed in 1692, and her will in 1693, settled the pre-
 mises upon *Sir Walter St. John*, *Cary* and others, upon
 trust to pay her debts, and then for the benefit of her
 grandson the Earl of *Litchfield* and his children; and
 gave several legacies to the appellants, the Ladies, and
 made the Earl of *Litchfield* and *Cary* executors; and
 upon her death the Earl of *Litchfield* entered and enjoyed
 the premises under the said deeds and will; and appel-
 lants received all or most of their legacies, and gave dis-
 charges for the same, which was a tacit affirmation of
 the will, but soon after, in *Hilary* term 1696, exhibited
 their bill in Chancery, to impeach and set aside the deeds
 and will, on pretence that great part of the lands claimed
 by respondents under the said deeds and will were not
 leasehold, but ancient inheritance of the *Wilmott* family;
 and, that although some part were leasehold, yet that
 Countess *Anne's* purchase in 1660, and all her subse-
 quent renewals, were not for her own use, but in trust
 for the Earls, *John* and *Charles*, and the appellants. And
 respondents about the same time exhibited their bill to be
 quieted in the possession under the said deeds and will:
 and on hearing both causes, a decree was pronounced in
 favour of respondents, as to so much of the premises
 as were leasehold, and the appellants bill dismissed; but
 there being some evidence that a moiety of a messuage,
 and some small quantities of land, (and which by a long
 unity of possession, could not be well distinguished from
 the leasehold), were the inheritance of *Earl Henry*, the
 court directed an inspection of all the deeds, and a trial
 at

1700. { at law to ascertain the same; and appellants shewed that it was fully proved, that the 2000*l.* purchase money, and all the fines paid by the Countess on her renewals, were her own money; and that she was so far from raising any monies out of Earl *Henry's* estate, or gaining any advantage by the *Wilmott* family, that out of her jointure of about 1200*l.* from Sir *Henry Lee*, her first husband, (which was settled to her separate use on her marriage with Lord *Rochester*,) and other great acquisitions from his family, she supplied Earl *Henry* beyond seas with great sums for his support, and laid out about 1500*l.* on Earl *John's* maintenance during his minority and above 2000*l.* for appellants, the Ladies, education and preferment in marriage.

Hen. Poo-
ley.

Die Sabbati 22^o Martii, 1700. Upon hearing council on this appeal, it was ORDERED and ADJUDGED by the Lords, that the same should be dismissed, and the orders complained of affirmed. *Lords Journ.* vol. xvi. p. 631.

Ralph Lester,

- - Appellant.

Isaac Foxcroft, Frances Nicolson,
Elizabeth Foxcroft, Henry Fox- } Respondents.
croft, and Benjamin Wbiccoll,

Case. 22.

THE appellant stated, that *Isaac Foxcroft* was seized in fee of a part of an ancient messuage called *Wildbouse*, in the parish of St. *Giles* in the Fields, in the county of *Middlesex*, and possessed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about 25th *March, 1695*, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that *Foxcroft* should, in consideration

ration thereof, lease the said part to appellant, from *Michaelmas*, 1695, for ninety-nine years, at a pepper-corn for the first year, and 150*l.* yearly rent for the last ninety-eight years. At the time of making which agreement, there was no memorandum or note thereof in writing; but in performance of the agreement, appellant entered into that part of the messuage, and, at his own cost pulled down the same, and built several new houses thereon (the whole fourteen being almost finished) and therein disbursed several thousand pounds; about 2000*l.* his own money, and several sums borrowed from *Foxcroft* upon his own securities, yet unsatisfied, and was all along in possession, and acted as sole proprietor and owner, and was acknowledged as such by *Foxcroft*; who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses were finished, appellant demised the same in his own name, received the rents, and *Foxcroft* never received nor claimed any part thereof: And about August, 1698, (*Foxcroft* being then ill of the sickness whereof he died) made his will, and his daughter, *Elizabeth Foxcroft*, sole executrix; and devised to his second son, *Isaac Foxcroft*, his heirs and executors, all his estate in the said ancient messuage called *Wildbouse*; and if he died under twenty-one, to his eldest son *Henry Foxcroft*, his daughter *Elizabeth*, and *Benjamin Whitchcott*, and appointed *Francis Nicholson*, guardian of his son *Isaac*, with power to let and set for such time during his minority, and immediately after making said will delivered it to appellant's wife, to let the appellant see there was nothing therein inconsistent with his said agreement; and ordered her to get a lease prepared speedily according to the agreement; and delivered to her two building leases executed by him, in pursuance of like agreements with others, as precedents to have appellant, his lease drawn by, and appellant accordingly caused the leases to be prepared, bearing date about the time of the said agreement, and brought two parts thereof to *Foxcroft* to be executed, who caused both of them to be read to him, and approved same; but observed that there was a mistake in one part thereof in his name, *John* being put for *Isaac*, and disliked that the sealing and delivery was not endorsed on the back thereof; and thereupon ordered appellant to get the mistake amended, and the endorsement made by the same hand that engrossed the deeds, and then to bring them again, and he would execute

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cute them; and often expressed his dissatisfaction that they were not brought back for execution as soon as he expected, and was under great uneasiness of mind lest he should die before it was done. And appellant a few days before the death of *Foxcroft*, brought the deeds so amended to his house to have them executed as he had directed, but respondent refused to let appellant see or speak with *Foxcroft*, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them; and since his death respondents refused to execute leases, according to the agreement, whereon appellant, in *Hillary* term, 1698, exhibited his bill in Chancery for a specific execution of the agreement, and the cause being heard 6th *March*, 1700, the Lord Keeper declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been at appellant's great expence so far executed on his part, there ought to be a reciprocal performance of it on the other part; and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them

J. Jekyll.
Hen. Pox-
tey.

The respondents, in affirmance of the decree, alleged, that *Isaac Foxcroft* made his will, dated 30th *August*, 1698, of the import stated by appellant, and died 15th *September* following; and, in *Hillary* term then next, appellant filed his bill against respondents for a specific execution of a parole agreement expended, and that respondents had answered that they knew not that appellant was any ways concerned in pulling down, and rebuilding the premises, otherwise than as agent or servant for testator, at whose proper charge and expence they insisted the work was done, and denied that any such agreement for a lease was ever made by the testator to appellant, and shewed that appellant was greatly indebted to the testator before any building begun, and that testator had no other way to obtain his debt but by employing him in work; and that testator, though of perfect understanding, had not taken any notice of such supposed agreement

agreement in his will, and that appellant had not required a performance thereof for near three years and an half after, nor until so near an approach of the testator's death; and shewed further, that three of appellant's witnesses were considerable legatees in testator's will, and that their evidence tended to enlarge the personal estate for their own benefit; and finally insisted, that nothing of such pretended agreement being in writing, and signed by either of the parties, the statute made John for preventing frauds and perjuries, was a full bar to the appellants pretences.

Die Lune, 7^o Aprilis, 1701. Upon hearing council This case on this appeal, it was ORDERED and ADJUDGED by though the Lords, that the decretal order of dismissal complained of should be reversed, and that the respondent, *Isaac Foxcroft*, or such other of the respondent's to whom the estate in question should come by virtue of his father's will, should when he or they should be of age divers execute to the appellant *Lyster*, his executors, &c. such a Vern. lease of the premises in question as was prepared and 456. Gilb. approved of by the said *Isaac Foxcroft*, the father, before Rep. 4 his death, and that the appellant and his assigns should 11. Prec. in the mean time hold and enjoy the same under the Cha. 519. covenants and agreements in the said intended lease 526. contained, discharged of all incumbrances done by said *Isaac Foxcroft*, or any claiming under him.—*Lords Journ.* Vol. xvi. p. 644.

Sir

1700.

Sir John Thomas, Bart.
and Dame Elizabeth
his Wife,

Appellants.

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Sir Charles Kemys,
Bart. Thomas, Lord
Wharton, Goodwin
Wharton, Esq. and
others,

Respondents.

Et d'contra.

Case. 23.

THE appellant stated that by a settlement made 15th April, 1674, on the marriage of *William Thomas*, and *Mary* his wife, two several terms of 500 years, lands in *Glamorgan*, and *Monmouth*, were limited to lord *Wharton* and *Goodwin Wharton*, in trust upon failure of issue male to raise 5000*l.* for daughters, and if but one daughter to be payable at her age of eighteen or marriage, with interest, at three pounds *per cent.* from the death of *William Thomas*, for her maintenance and education; and there being a son named *Edmond*, (afterwards *Sir Edmond*) and a daughter named *Ann*, and no provision being made for daughters, unless in failure of issue male, *William*, by indenture, 20th March, 1676, conveyed divers other lands, then in jointure to *Dame Ann Morgan* and *Jane Oldsworth*, unto Lord *Wharton* and *Goodwin* for 200 years, to raise 5000*l.* for daughters, and if but one daughter for her, payable at her age of 16 years or marriage, and 30*l.* a year maintenance for each daughter till eight years old, and then 60*l.* till her portion payable: Provided, if *William* should afterwards make satisfaction, or provision for such daughter, to the contentment of Lord *Wharton*, and *Goodwin Wharton*, then the term of 200 years to be void: and *William* died 1677, leaving issue a son and daughter, viz. *Edmond*, afterwards *Sir Edmond*, and the said *Ann*.—*Sir Edmond* died without Issue, 17th January, 1692, being then about 19 years old, whereupon the whole family estate, near 3000*l.* *per annum*, descended to the said *Ann* as heir at law; and *Sir Edmond* made his mother, the late Lady *Kemys*, his executrix, whereby she got to her own use the profits of his whole estate, which she had received for 15 years as his guardian, worth above 30,000*l.* and *Ann*, the daughter, attained her age of

of 18 years, 10th *August*, 1694, and died of the small-pox 24th *August*, 1694; and during her illness a clergyman, who attended to pray with her about two days before she died, asked her how she would dispose of what she had? she answered, in general words, "all that is in my power to give, I leave to my mother, brother and sisters," (meaning *Charles*, *Jane*, and *Mary Kemys*, her mother's children by Sir *Charles*) and also gave some specific legacies, and some small money legacies to other persons; which words the clergyman wrote in short hand, but when written did not appear: Soon after her death, Sir *Charles Kemys* and his Lady took out administration as if she had died intestate, but about seven months afterwards, upon better consideration, procured some of the legatees to sue them in the Prerogative court, to repeal that administration, and thereupon an administration, with such nuncupative will annexed, was granted to Lady *Kemys*; and by this nuncupative will they gained two houses in *Holland* worth 2000*l.* and about 4000*l.* money in the Bank of *Holland*, which would otherwise have come to the appellant as heir; besides which *Ann* had 4000*l.* ready money, and securities for great sums of money and jewels of great value, all given her by the Lady *Morgan*, her grandmother, all which, as personal estate, together with two years rents and profits of the whole real estate, received during the life of *Ann* (not charged with the 5000*l.* portion) came to Lady *Kemys* and her three children, under the nuncupative will; yet Sir *Charles Kemys* and his Lady claimed said two sums of 5000*l.* a-piece, solimited for the portion of *Ann*, and brought ejectments, and got judgments therein in the name of the trustees; whereupon appellants brought their bill in Chancery against respondents, for an injunction to stay proceedings on said ejectments, and to compel them to assign the trust terms to appellants; and 9th *March*, 1694, the cause was heard before the late Lord Chancellor, who declared that the terms for years were not discharged by the inheritance vesting in *Ann*, and that the 5000*l.* portion limited by the last settlement, ought to be raised and stand charged upon said estate, together with several sums for maintenance for *Ann* till her age of 16 years, and from thenceforth full interest for said 5000*l.* and decreed an account of the profits of the trust estates from the death of Sir *Edmond* to the death of *Ann*, but gave no direction how same should be applied, nor reserved

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reserved the consideration thereof, nor referred it to a master to compute any account of the said 5000*l.* and maintenance and interest; but declared that upon construction of the trusts, one 5000*l.* only ought to be raised; and appellants insisted that the portion of 5000*l.* was designed as a provision for the daughter, in case she should have nothing else, and ceased when the reason and occasion of raising it ceased; namely, when the estate and inheritance out of which it was to be raised descended upon *Ann*; for it were against reason that her own estate should be debtor to herself, and the portion once ceased, the estate ought to remain discharged in the hands of appellant to whom it descended. And that it was not in the power of *Ann* by nuncupative will to revive the portion, or continue it as a charge upon her inheritance, because she was an infant; and that although she had made a deed by express words to charge the portion, or had appointed it to be raised out of her inheritance, such deed would have been void by reason of her infancy; and further, that it did not any way appear that *Ann* had any thoughts or intention of giving away this portion, or that there was any discourse about it, but all she could be presumed to mean by this gift, was the ready money, jewels, and other things which her grandmother (the Lady *Morgan*) had given her; and that the respondents themselves laid no stress upon this nuncupative will, but took out administration to *Ann* as intestate, and never set up the will till seven months afterwards, when the clergyman swore to it from his short-hand notes; and that appellants were strangers to those proceedings, nor if they had known of them, could they by the course of the Prerogative court have opposed them; and respondent's probat was not examinable in Chancery; and appellants insisted that the respondents ought not to be favoured, for Lady *Kemp* for a portion of 5000*l.* had a jointure of 800*l.* *per ann.* dishonourable of waste, and that Sir *Charles* had cut down 1000*l.* worth of timber and wood, and particularly groves, ornaments of the family seat at *Rupera*, and destroyed the deer there; and respondents had received the profits of the estate for 17 years, and gained 15 years profit of the rest of the estate, not in jointure, worth 1300*l.* *per annum*, and also received the profits of another estate worth 700*l.* *per annum*; and appellants further shewed that after this cause had been by the Lords ordered to be heard, respondents brought a cross appeal, complaining

complaining that both the portions of 5000*l.* with interest, are not appointed to be raised by the said decrees, and desiring that the decree may be altered and rectified in that behalf, which respondents insisted there was no colour for; and that it appeared upon comparing both deeds, that the only reason for making the last settlement in 1676, was because there was then issue a son and a daughter, and by the first settlement in 1674, no provision was made for daughters but in case of failure of issue male; and the 5000*l.* demanded by this cross appeal, did not become due to *Ann* till after the inheritance had descended upon her.

1701.

Martin,

Lords

Tavern.

vol. xvi. p.

636.

William

Dobyns.

The respondents shewed on the other hand, that the greater part of the premises comprised in the settlement of 1676, had been the estate of Sir *Thomas Morgan*, and *Lewis Morgan*, *William Thomas's* maternal grandfather, unto whom the appellant *Elizabeth* was not any ways related, and yet, as being heir at law of *William Thomas*, she had under that settlement become intitled to, and enjoyed those estates; and that *Ann* survived her brother, arrived to the age of eighteen years, and 20th *August*, 1694, made a will, of the import stated by appellant, and that dame *Mary Kemys* took out administration to *Ann* her daughter, with her will annexed; and she soon after dying, Sir *Charles Kemys* took out administration, *de bonis non*, to *Ann*, with her will annexed; but respondents did not state the will to have been nuncupative, nor that dame *Mary* first administered to *Ann* as intestate, but stated that Sir *Charles* and dame *Mary Kemys*, in order to recover the two sums of 5000*l.* together with arrears of *Ann's* maintenance, with interest from the times payable, brought ejectments in the trustees names, and obtained judgment, and that then appellants filed their bill, and such decree made as stated by appellants; and respondents insisted that Sir *John Thomas's* appeal ought to be dismissed, and that upon the cross appeal both sums of 5000*l.* ought to be decreed to respondents, and that the two separate settlements had provided for the raising two several 5000*l.* upon several and distinct funds payable at different times, and upon distinct and different contingencies, and provided different sums for maintenance in the mean time, without any declaration in either settlement, that the one sum was intended in lieu or satisfaction of the other, and that the terms (being lodged in trustees) were not

merged

merged or extinguished; and that, as there was a legal remedy left at law for recovery thereof, there was no reason for a court of equity to interpose for the benefit of a remote relation, though heir at law; and that the two sums of 5000*l*. and 5000*l*. were in their nature personal estate, and as such vested in *Ann*, who was of sufficient age to dispose by will, and had sufficiently disposed thereof; and that the inheritance descending upon her, ought not to turn to her prejudice, or disabie her from disposing of her personal estate; and insisted that there was no precedent where a Court of Equity had decreed an extinguishment in a case of this nature; and that such new construction ought not to be introduced in this case, appellants enjoying above 2000*l*. *per annum* (subject only to the demand in question) of which above 1000*l*. *per annum* was the inheritance of the *Morgans*, to which appellants had no title, but under the very settlement of 1776, by which 5000*l*. is appointed to be raised as aforesaid.

Henry
Poley.

Die Martis 82. *Aprilis*, 1701. Upon hearing council on these appeals, it was ORDERED and ADJUDGED by the Lords that both appeals should be dismissed, and the decree complained of affirmed. *Lords Journ.* vol. xvi. p. 645.

Eq. Ab.
269.
2 *Vern.*
348.

1701.

The Honourable *Henry Cornwall*, } Appellant.
Esq.

Elizabeth Williams, an infant, - Respondent.

Maclean

THE appellant made this case: *Richard Williams* Case. 24.

seized in fee of lands in *Brecon*, *Radnor*, and *Hereford*; by his will in writing devised to his wife thereout a rent charge of 25*ol.* for her life, in lieu of dower, and devised the inheritance, charged with debts and legacies, to his brother *Thomas*, who upon his death became seized, and by marriage deeds of lease and release, 22d and 23d *October*, 1696, settled part of his estate, to the value of 34*ol. per annum*, upon *Elizabeth*, his intended wife, for her jointure, and settled the whole estate (about 68*l. per annum*.) upon the issue male of that marriage, remainder to himself and his right heirs; and if he died without issue male, and left one daughter, that then the premises should be charged with 300*ol.* to be paid to that daughter at her age of twenty one years, and 15*ol. per annum* for her maintenance in the mean time; which marriage took effect, and, 18th *May*, 1697, *Thomas Williams* (having then no issue) made his will, and thereby charged his estate with his debts, and subject thereto devised the whole estate to his brother in law, and nearest kinsman, Doctor *David Williams*, and his issue male, remainder to *Henry Williams* and his heirs for ever, and made Doctor *Williams* executor, and died 29th *May*, 1698, without issue male, leaving respondent *Elizabeth*, the infant then about three months old, his only child, and Doctor *Williams* immediately entered, and being in quiet possession in the premises, and finding the debts and incumbrances were more than the estate could answer, proposed to sell the estate to the widow, which she at first agreed to, and articulated with Doctor *Williams* accordingly; but after she desired to be released from those articles which the Doctor in favour to her (as she acknowledged) complied with; after which the Doctor and *Henry* proposed to sell to appellant, who had other manors adjoining; and articles, dated 14th *January*, 1699, were executed between Doctor *Williams*, *Henry Williams*, and appellant, whereby they covenanted

to

1701. { to convey the fee simple of the real estate, and all the goods and stock thereon (which had been the goods and stock of *Thomas*) unto appellant; and in consideration thereof appellant covenanted to pay 200*l.* for the personal estate, 4500*l.* for the real estate, and 3000*l.* to *Elizabeth*, the infant, when she attained her age of 21 years, and till then 150*l.* *per annum*, for the interest of it: and to pay the widow of *Richard Williams* (then the wife of Doctor *Page*) the rent charge of 250*l.* *per annum* for her life, and to permit *Elizabeth*, the widow of *Thomas*, to enjoy 34*l.* *per annum* for her life; and Doctor *Williams* and *Henry Williams*, covenanted to pay the debts of *Richard* and *Thomas Williams*; and possession of the whole estate was immediately delivered to appellant, who, whilst fines and conveyances were preparing, provided the purchase money, and, in confidence of the articles, disbursed several considerable sums for taxes and repairs; and by direction of Doctor *Williams* actually paid, in part of the purchase money, 1029*l.* 3*s.* 4*d.* a mortgage debt to one *Oades*, and paid Doctor *Williams* himself 300*l.* more; but the wife of Doctor *Page*, who was widow of *Richard Williams*, dying before the conveyances were perfected, *Elizabeth*, the widow, of *Thomas* gave out that Doctor *Williams* and *Henry* had no power to sell the real estate, but that respondent *Elizabeth* was intitled to it; wherefore appellant, 29th *January*, 1699, preferred his bill for discovery of title, and for a specific performance of the articles; and *Elizabeth*, the widow, and respondent, by their answer, insisted respondent was intitled under the will of *Thomas*; whereupon the creditors preferred their bill, and their debts were admitted by all the defendants: And 8th *July*, 1700, the causes were heard by the Lord Keeper, and a question arose upon the will of *Thomas*, wherein, after the real and personal estate were charged with his debts, was a clause in these words: “ And “ whereas by the settlement made upon my wife, I have “ reserved the fee and inheritance of all my messuages, “ lands, and tenements in myself after the estate tail “ therein is spent; now my will is, that in case I die “ without issue, or that the issue by me begotten shall “ happen to die without issue of his, her, or their “ bodies, or that the estate tail limited by that settlement shall happen to determine and be spent, I do “ hereby give and bequeath unto my well-beloved kinsman *David Williams*, whom I do hereby appoint to “ pay

“ pay all my debts and legacies hereby given and to be
 “ given, and upon condition that he pay the same, all
 “ my manors, messuages, &c. to hold to him for his life,
 “ then to his first and other sons in tail male, remainder
 “ to *Henry Williams* in fee, and if the Doctor leave
 “ issue male the estate to be charged with 500*l.* for
 “ *Henry*.” And upon the hearing the court dismissed
 appellant’s bill, which dismission appellant insisted ought
 to be reversed; because in the construction of wills the
 intention of the testator is principally to be regarded,
 and it manifestly appeared testator intended two things,
 that his debts should be paid, and that after payment of
 his debts the heir male of his family should have what
 remained of his real estate; and that this was his inten-
 tion appeared by the marriage settlement, by the will,
 and by his repeated verbal declarations; for by the set-
 tlement the estate was limited to the issue male, and an
 ample provision made for the daughter, and by the ex-
 press words of the will the estate was devised to Doctor
Williams, charged with the debts, if the estate limited
 by the settlement (which was on the issue male) happen
 to determine or be spent; and it was proved in the cause
 that after making the settlement, and before and after
 making the will, testator frequently declared that if he
 died without issue male, his kinsman Doctor *Williams*
 should have his estate. And appellant shewed that if *W. White*
 the dismission should be reversed, the creditors would lose,
 soon be paid, the purchase money being ready, who
 otherwise could not receive satisfaction in many years.
H. Harcourt.

The respondents in affirmance of the dismission shewed,
 That *Thomas Williams*’s estate was 850*l. per annum*,
 and worth 17,000*l.* to be sold) and was charged with
 several debts of his late brother *Richard*, and the 250*l.*
 rent charge to his widow; and that he made the set-
 tlement stated by appellant, and frequently before and
 after his daughter was born, declared that if he should
 die without issue of his own body, his estate should never
 go to any of the *Rumsfords*, who were his heirs at law,
 but he would in such case give it to his kinsman *David*
Williams, doctor in physic, who had married his sister;
 and afterwards, before his daughter was born, made his
 will as stated by appellant; and that after respondent
 was born, (as fully proved in the cause) he on several
 occasions declared she should have his estate, and that it
 was pride in any one to give his estate from his daughter

{ 1701. } to preserve a name; and that if he had 10,000*l.* a year she should have it all. And that immediately upon his death Doctor *Williams* (who was his physician, and present with him when he died) possessed himself of the will and the personal estate, and gave out that the said *Thomas* had given him all his estate, paying his debts and legacies; and that they, with other char^{es}, were so great that he should be obliged to sell the estate. And that *Elizabeth*, the widow, having never seen the will, but believing it to be so as the Doctor had declared, entered into an agreement with him for the purchase of the estate; but her father commanding her to desist, that agreement was waved on both sides. And then the Doctor and *Henry Williams* contracted with appellant, who paid 300*l.* to Doctor *Williams* in part of the purchase money, and paid off a mortgage, or other incumbrance, for 1000*l.* and interest. And respondent's mother having proved the will, was advised her daughter had there-under an estate tail, and that the Doctor had no present estate given him by the will, only a power to sell so much as the personal estate should fall short of the debts and legacies, and that the mother acquainted appellant therewith before he had perfected his agreement for the purchase, or paid any money, and cautioned him against proceeding in the said purchase; but appellant on Mrs. *Page's* death, whereby 250*l.* rent charge had fallen in, filed his bill for a specific performance of the articles of purchase, and the creditors exhibited their bill to have their debts paid; which bills respondent and the other defendants having answered, several witnesses were examined on all sides, and the causes were heard before the Lord Keeper, assisted by the Master of the Rolls, Justice *Powell* and Justice *Blencowe*, 18th *June*, 1700, when the court took time to consider; and 8th day of *July* following declared that he, the Master of the Rolls, said two Judges, and likewise the Lord Chief Justice *Treby*, (the case having been delivered to him in writing by his Lordship's order) were all, on consideration of the whole matter, of opinion, that an estate tail in all the said premises was vested in respondent *Elizabeth* by the will of *Thomas Williams*, her father, so that the court could not oblige a performance of the articles; and therefore ordered that the appellant's bill should stand dismissed, and upon the creditors bill it was ordered, that it be referred to a Master of the Court to state the debts, and in case the personal estate should fall short,

short, then so much of the real estate should be sold to pay them; and that appellant should account for what he received out of the real estate, and be allowed what he had laid out upon the said premises in lasting improvements, and that he should be paid what he had paid on account of the purchase, and taking in of incur-brances, with interest and costs, and thereupon he to assign and re-convey to respondent. And respondent insisted that it was the plain intent of her father, that she should enjoy the estate after the debts and legacies paid; and that a strained construction of the will ought not to be made to disinherit her in favour of a remote relation.

Die Sabbati, 12^o Aprilis, 1701. Upon hearing council upon this appeal, it was ORDERED and ADJUDGED by the Lords that the same should be dismissed, and that the order of dismissal and decree therein complained of should be affirmed. *Lords Journ. vol. xvi. Foley.*

Richard
Buckly.

William

1701.

William Handcock and Leonard } Appellants.
Hatfield, Esqrs.

Sir Arthar Sharn, Bart. Heir and
 Administrator of *Sir James Sharn,* } Respondent.
 deceased,

Case. 25.

THE appellants made this case: *George, Earl of Kildare*, 23d, October, 1641, granted a lease (*inter alia*) of *Killinure* and *Balline Clough*, in the county of *Westmeath*, in *Ireland*, to *Sir James Dillon* for 36 years, at 37*l.* 10*s.* rent, and 15th February, 1656, *Earl Wentworth* his son, (*Earl George* being dead) in consideration of the surrender of former leases, and of 25*s.* paid him, demised the premises to *Ridgley Hatfield* (since deceased) for 29 years, at the same rent of 37*l.* 10*s.* for the first 18 years, and 40*l.* *per annum* afterwards, and covenanted that the premises were free from incumbrances; and 23d February, 1656, *Ridgley Hatfield*, for 127*l.* 10*s.* assigned part of the premises to appellant *Handcock* for the remainder of his term, paying unto *Earl Wentworth* and his heirs, for the first 4 years, 5*l.* *per annum*, and the next 14 years 10*l.* *per annum*, and for the remaining 11 years 20*l.* *per annum*; *Sir James Dillon* assigned his lease to *Thomas, Viscount Dillon*, who being indebted by recognizance to *Arthur, Viscount Ranelagh*, he, Lord *Ranelagh*, in November, 1675, by an extent on the recognizance, possessed himself of that lease, of which about 21 years were then unexpired.

Handcock and *Hatfield* having no notice of that title, were forced to buy it in from Lord *Ranelagh* for 220*l.* and afterwards held the land, and paid the reserved rent to *Earl Wentworth* until 1663, when he died: And Lord *Dillon* (having been beyond sea with King *Charles* the second) was on his return, in 1663, restored by a decree of the Court of Claims, and put into possession under an injunction, for the remainder of the term demised by *Earl George*; and accordingly enjoyed it till it expired in 1677, and always paid the reserved

reserved rent of 37*l.* 10*s.* to appellant *Handcock*, under the 29 years lease to *Ridgley Hatfield*.

1701.

Sir *James Shaen* was indebted to *Handcock* by bond, dated 15th *February*, 1661, 200*l.* principal money, and six years interest, for which *Handcock*, in 1677, importuned Sir *James Shaen*, who then pretended some title to the premises, and told *Handcock* he might pay himself out of the rent reserved on the 29 years lease; and *Handcock* accordingly, during the infancy of *John*, then Earl of *Kildare*, and without his privity, received the reserved rent from Lord *Dillon* and *Hatfield*, and retained and applied it towards his own debt, but never since 1685, otherwise paid Sir *James Shaen* or Sir *Arthur Shaen* any rent for those premises; because Earl *John*, on coming of age in 1683, exhibited his bill against appellants and Sir *James Shaen*, for discovery of their titles, praying that appellants might account with him for the said rents; and appellants retained said rent to recompense themselves for the damages suffered by such prior incumbrances of Lord *Ranelagh* and *Dillon*; and, in 1687, Sir *James Shaen* exhibited his bill for an account of the rent and possession of the premises; and in the same year appellant *Hatfield* exhibited a cross bill against Sir *James Shaen*, Earl *John*, and others, to discover their titles, and to be quieted in his possession, and to have satisfaction for the time he was ousted by Lord *Ranelagh* and *Dillon*'s titles, and for his improvements; which bill Sir *James* refusing to answer, appellant *Hatfield* obtained an injunction to quiet possession, and also to stay Sir *James*'s proceeding till answer and further order: And in *Michaelmas*, 1692, Sir *James* put in an insufficient answer, and on exceptions submitted to answer over, but neglected so to do, and *Hatfield* had process of contempt against him to a serjeant at arms; and, 1695, Sir *James* died in contempt, and never filed a further answer; but after his death respondent, Sir *Arthur*, in 1696, as his heir and administrator, exhibited an original bill in Chancery against the appellants *Handcock* and *Hatfield*, without making Earl *John* a party, alleging leases and conveyances of the lands in question, made 30th December, 1656, by Earl *Wentworth* for 125*ol.* to Sir *James Shaen* for 41 years, at 11*ol.* per annum rent; and that Earl *Wentworth*, 24th December, 1659, for 45*ol.* by another lease demised the same lands to *John Humphrys*

1701. *Humphrys* for 99 years, at 100*l.* *per annum* rent; and afterwards, 25th and 26th *May*, 1660, together with *John*, Earl of *Clare*, and *Robert Boyle*, Esq. conveyed the fee and inheritance of the same lands to *Arthur*, late Earl of *Anglesey*, and others, in consideration of 1000*l.* and pretended that the said 99 years lease to *Humphrys*, and conveyance to Lord *Anglesey*, were in trust for Sir *James Shaen*, though they were no parties to this bill, nor did that matter otherwise appear in the cause; and though appellants in their answer to Sir *Arthur's* bill, insisted on Earl *John's* title, and proved articles of the 17th of *March*, 1657, on the marriage of Earl *Wentworth*, with *Elizabeth*, daughter of *John*, Earl of *Clare*, in consideration of 6000*l.* her portion, and also proved a settlement made 3d and 4th *May*, 1658, in pursuance of those articles, whereby Earl *Wentworth* was made tenant for life, and Earl *John* tenant in tail; and therefore insisted that Earl *John* ought to be made a party to contest Sir *Arthur's* pretended title, so that appellants might pay their rents safely, and be indemnified; notwithstanding which the Court of Chancery in *Ireland*, 5th *February*, 1699, proceeded to a hearing, and decreed Sir *Arthur Shaen* the possession of the premises in question, and that appellants should account for and pay him the rents thereof ever since the 25th *March*, 1686, which decree appellants conceived to be erroneous; because it did not appear that Sir *James Shaen* paid the 1250*l.* or the 110*l.* *per annum* rent, reserved on the 41 years lease, or ever had any possession under it, or paid the 450*l.* consideration, or the 100*l.* *per annum* rent reserved in the 99 years lease, or had any possession under it; nor that the conveyances in 1660 were made to the Earl of *Anglesey* and others in trust for Sir *James Shaen* and his heirs; and because it appeared that Earl *Wentworth* was bare tenant for life, and had no power to make such 99 years lease, or conveyance in fee, and that it was contrary to law and the rules of equity, to decree possessions, and determine titles of freehold and inheritance in equity, without having before the court the parties interested in point of title, and more especially to determine landlords freeholds upon tenants defences, the landlords not being themselves parties; and that the Earl of *Kildare* not being made a party, appellants could not be indemnified as against him, but that he, notwithstanding the said decree, might proceed against appellants upon the covenants in their

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their leases, or upon his bill exhibited in 1683, or any new bill, or by an ejectment of the premises, and no injunction could be granted against him, he being no party to that decree, nor claiming under any person party to it; and prayed that the decree might be reversed. John Hawkes.

The respondents in affirmance of the decree made this 31st Dec. 1656.

That Earl *Wentworth*, by indenture dated 31st Dec. 1656, in consideration of 1250*l.* demised the lands in question, and several other lands (which by leases in being did not then yield above 100*l.* a year) to Sir *James Shaen* for 41 years, at 110*l.* rent; and 2d Dec. 1659, in consideration of 250*l.* did by another indenture demise the reversion to *John Humphrys* for 99 years, in trust for Sir *James Shaen*, at 100*l.* rent; and by lease and release, 25th and 26th May, 1660, Earl *Wentworth*, with consent of *John*, Earl of *Clare*, (whose daughter Earl *Wentworth* had married) and of the Honourable *Robert Boyle*, Esq. in consideration of 1000*l.* conveyed all said lands and premises to *Arthur Annesley*, Esq. afterwards Earl of *Anglesey*, and others, and their heirs, in trust for Sir *James Shaen* and his heirs; and soon afterwards said Earls of *Kildare* and *Clare* ordered said lands to be left out of the Earl of *Kildare*'s rent-roll, and it was so done; and Sir *James Shaen*, until *Michaelmas*, 1685, received the rents of the premises in question from appellants, or those they derive under, and the lease under which the appellants claimed expired 25th March, 1686, before and after which time appellants made frequent applications to Sir *James Shaen* and respondent, to renew their leases at an under value, which being refused, appellants threatened to set up Lord *Kildare*'s title, pretending to be his tenants, and that they had attained to him; and shewed that respondent, after his father, Sir *James*'s death, exhibited his bill against appellants, to be restored to the possession of the premises in question, and for an account of the mesne profits since their lease expired, they having from that time held over the possession; and that appellants in their answer insisted they never were tenants to Sir *James* but to *John*, Earl of *Kildare*, and believed his title best, though appellant *Handcock*, in his answer to a bill formerly filed by said Earl of *Kildare* in the Exchequer, set forth, that he was well assured that said deeds of lease, as also of the reversion, were duly made over to the said Sir *James Shaen*, or in trust for him, and

1701.

and that he had duly paid the rents to Sir *James* or his order; and that he and *Ridgley Hatfield* (under whom appellant *Hatfield* claimed,) held as Sir *James's* tenants, by virtue of the lease for 29 Years, which he expected to hold to the end of the term; and the appellant *Hatfield* made proposals in his own hand-writing, to take a new lease from the respondent's father, representing and recommending himself as Sir *James's* faithful old tenant; and it appeared by proofs in the cause that respondents were, and always owned themselves tenants to respondent and his father; and that the thancellor, upon hearing the cause, decreed an injunction to restore respondent to the possession, and appellants to account for the mesne profits at 40*l.* yearly, the old rent, from the expiration of the lease to the time of the bill filed, and from that time according to the full value; and appellants to have allowance for such money as they paid to the Lord *Ranelagh* on account of disturbance, or for his interest in the lands; which decree respondent alleged was very favourable to appellants, in abridging the mesne profits to 40*l.* a year for that time, the premises being worth 500*l. per annum*; and as to the suggestion in the appeal, that no decree ought to have been made, the Earl of *Kildare* not having been a party, respondent shewed that the decree was agreeable to justice, and the constant course and practice of the courts of equity in *Ireland*; which never permit tenants who hold over their terms, to set up a title in any other person against their landlord, whose title by their lease they had acknowledged and held under; for that would be contrary to the fidelity due from a tenant to his landlord, and a breach of the trust reposed in him; and that it would be of fatal consequence to all the protestant proprietors in that kingdom, whose tenants (being generally papists) would thereby be encouraged to betray the possession to the old Irish proprietors, and drive their protestant landlords to be plaintiffs at law, where it would be almost impossible to make out their title, most gentlemen's evidences being lost or destroyed in the many wars, rebellions and disorders which have happened in that kingdom; and that this is the rather reasonable, because by the decree the possession is barely to be restored, which cannot interfere with the right of any man but the very tenant party to the bill; and further insisted, that the Earl (who and his ancestors had been out of possession near 50 years) should not be put into possession till they

had made a title at law, and that the respondent, who had been so long in possession, ought not to be stripped of his long possession by the fraud of his tenants; and shewed that the Earl of *Kildare*, though no party in the cause, had petitioned the Lords, setting forth, as appellants have, which was without precedent, and prayed both petitions might be dismissed with costs.

Die Luna, 20^o Aprilis, 1701. Upon hearing council upon both these petitions, it was ORDERED and ADJUDGED by the Lords that the petition of *John*, Earl of *Kildare*, should be dismissed without prejudice to the Earl's title, and that the decree complained of by appellants be reversed, the Court of Chancery in *Ireland* having proceeded to hear the cause without proper parties, but without prejudice to the title of Sir *Arthur Shaen*; and it was further ordered that the respondent should forthwith amend his bill, and make the Earl of *Kildare* a defendant; and that the appellant should procure the Earl of *Kildare* to appear and answer before *Michaelmas* Term next, so that the cause might come on to be heard before the Chancery in *Ireland* as soon as might be; and that in case the appellants should not procure the Earl to appear, answer, and examine his witnesses, so as the cause might come on as aforesaid, that then the said decree should stand and be affirmed.

Lords Journ. vol. xvi. p. 662.

John

1701.

John Dormer of Ascott, Esq. - Appellant.

The Honourable *Charles Bertie*,
Henry Bertie, *Anthony Henley*,
 and *Mary* his Wife, and *Bridget*
Bertie, *Henry Cane*, *Charles Cane*,
Matthew Cane, and *John Cane*,
John Dormer, of *Rowsham*, Esq.
Charles, *William*, *Robert*, *Philip*,
 and *James Dormer*, Esqrs.

Respondents,

Case. 26.

THE appellant made this case : That the father of *Robert Dormer* had married the half sister of respondents, *Charles* and *Henry Bertie*, and had issue by her the said *Robert Dormer*, who died without issue, seized of a real estate 200*l.* *per annum*, and possessed of a great personal fortune, leaving appellant, the son of *William*, only brother to the said *Robert's* father, his heir at law, and that said *Robert Dormer's* real estate ought to have descended to appellant; but that a will, dated 10th November, 1693, had been set up by the contrivance of one *Henry Cane*, since deceased, who had been a bailiff or steward to Mr. *Pitt* and Sir *John Borlace*, and was once only employed by the said *Robert Dormer*, to take the accounts of his estate, which will gave the respondent *Charles Dormer*, his brother of the half-blood, and his heirs 200*l.* *per annum*, in case he should be living three years next after testator's death, and desired his executors to settle it upon him out of his estate in *Dorton* and *Brill*, in the county *Bucks*; and if he should die before said three years, that then the said 200*l.* *per annum*, and the inheritance thereof, should be equally divided between the rest of said respondents younger brothers, viz. respondents *William*, *Robert*, *Philip* and *James Dormer*, and *Clement Dormer* (since deceased) that should be then living, to be and remain to them and their heirs; and in like manner devised 200*l.* *per annum* to each of the respondents, *William*, *Robert*, *Philip* and *James Dormer*, and to the said *Clement*, and to *Frances Dormer* his sister of the half-blood, if alive two years after his death, 1000*l.* to be paid by his executors, and in case she should die before that time, then of that 1000*l.*

100*l.*

100*l.* each to *Ann Dormer*, her mother, and to her brothers, respondents, *Charles, William, Robert, Philip* and *James Dormer*, and said *Clement Dormer*, and the remaining 300*l.* to be equally divided between his acting executors, and to his uncles *Peregrine Bertie*, Esq. (since deceased) and respondents *Charles* and *Henry Bertie*, and the said *Henry Cane* (since deceased) 5*l.* a piece, to buy each of them a mourning ring; and directed all his debts, legacies, and funeral expences, to be paid by his executors; and gave all the rest of his real and personal estate whatsoever equally among his acting executors, and appointed his said uncles *Peregrine, Charles* and *Henry Bertie*, together with the said *Henry Cane*, deceased, executors of his said will: And the supposed testator died 1st *February*, 1693, and that this will was contrived and written by the said *Henry Cane*, who was proved to have been a designing person, and notorious for making his master, Sir *John Borlace's* will, whereby he provided for himself 400*l.* *per annum*, secured out of the manor of *Stratten Audley*, besides other legacies to his family; and boasted he could have made whom he pleased co-executors with him of Mr. *Dormer's* will, though he was an utter stranger to him till within some short time before his death; and when sent for to make Mr. *Dormer's* will, had 20 guineas reward for his pains; yet knowing testator to be a weak man, and a fit subject for imposition, joined himself with respondents, the *Berties*, in the trust of the whole estate, thereby to shelter himself in his designs upon the said estate and devised to himself, and co-trustees, a noble feat which cost above 20,000*l.* building, besides a real estate of 2000*l.* a year, and a personal estate of about 20,000*l.* and that after all the trust in the will performed, there would remain a surplus of the real estate of above 8000*l.* a year, besides timber of great value, together with the ancient family feat, which appellant was intitled to as heir at law, and ought to enjoy; but which respondents, the executors and trustees, insisted, by the artificial penning of the will, belonged to them, and ought, with the land, to be equally divided between *Cane* the bailiff, and his co-trustees the *Berties*; and that appellant, 11th *January*, 1697, exhibited his bill in Chancery for relief, and insisted if any such will made, yet testator's personal estate ought to come in aid of his real, and be applied in ease thereof to discharge his debts, legacies, and

1701. and funeral expences; and that appellant was intitled to the surplus of testator's real estate after the bequests to his six brothers of the half blood, and the other trustees, as a resulting trust for him as heir at law, and particularly to the mansion house of such value as aforesaid; and further, that appellant was, as heir at law, intitled to the profits for the 3 years next after testator's death, of 120*l.* *per annum*, then devised to his said six brothers; for that it could not be reasonably inferred from the will, but that the testator intrusted his executors with his whole estate, merely in trust to see his will performed, which done, the benefit of the trust of what is left, resulted back to the testator's heirs; and that such appeared to be testator's intention, as well from what testator declared to his brother *Charles*, after the will was executed, as from what *Cane*, the very penner of the will, declared to respondent *Charles*, after the will made and published; and further by the will itself particular legacies had been given to the executors, which had been altogether needless, if testator intended them to have had the entire benefit of the surplus of his estate: And that respondents put in their answers, and said *Peregrine Bertie* and *Henry Cane*, (both then living) and the said executors, answered this bill, 16th *March*, 1697, and insisted on the said will, and that they were there-under intitled to the residue of the estate, after the will performed in disherison of appellant; and respondents, the *Dormers*, insisted on their 200*l.* a year respectively; and respondent, *John Dormer*, insisted he was intitled to the 200*l.* a year bequeathed to said *Clement Dormer* as his heir at law, inasmuch as said *Clement* out lived the testator three years, and afterwards died without issue; and that in that cause witnesses were examined on both sides, but through neglect and mismanagement of appellant's agents, one *Henry Smith*, a material witness for appellant, who could have proved a trust in the executors for appellant, and that testator had well enough gratified *Cane* for making his will, was not fully examined to that matter, because (as was then apprehended) appellants interrogatories were not full enough for that purpose, and that appellant had therefore, before publication passed, applied to the Court of Chancery for leave to add a new interrogatory to said *Smith* touching that matter; which on the 6th *February*, 1698, was ordered accordingly; but that by a subsequent order, 9th *February*,

bruary, that order was discharged, and appellant deprived of the benefit of *Smitb's* testimony; appellant therefore insisted that the order of the 9th of *February* ought not to have been made, but that *Smitb's* testimony ought to have been taken according to the order of the 6th of *February*; and appellant further stated, that respondent, *Charles Cane*, was examined as a witness for his father, and swore that testator expressed himself dissatisfied with appellant's conduct of his own affairs; and that it was proved that testator was always familiar with and kind to appellant, and continually shewed him great favour and respect; and shewed further, that appellant's cause, together with respondents cause against him, and the executors of the said *Robert*, were heard before the late Lord Chancellor *Somers*, 3d *March*, 1698, and that it was then ordered that the said *Henry Cane* should be examined upon interrogatories, for discovery of the draft of, and instructions given by testator for said will; and that a trial at bar was directed to try the validity of the said will, and that said *Henry Cane* was accordingly examined, and pretended that as soon as the will was published, the instructions and draft were burnt or torn, and that thereupon appellant thought fit to waive the trial and admit the will; and that the causes were again heard, 14th *June*, 1699, and appellant's bill dismissed; but provision was made as to the lands devised to the testator's said half brothers and their respective heirs; and that appellant submitted to such provision and bequests; and that said *Henry Cane* died since the decree, and by his will devised his pretended interest in *Dormer's* estate to his sons, respondents, *Henry*, *Charles*, *Matthew*, and *John Cane*, and made said *Henry* and *Charles* his executors; and that said *Peregrine Bertie* also died, and by his will devised his pretended interest to the respondents, *Anthony Henley* and *Mary* his wife, and *Bridget Bertie*, said *Mary* and *Bridget* being daughters and co-heirs of the said *Peregrine*, and made *Bridget* his executrix; and appellant insisted he was aggrieved by the decree of dismissal, and that he was well intitled to the relief prayed by William Whiteock.

The respondents on the other hand made this case: That *Robert Dormer*, Esq. was seized in fee of a real estate of near 1700*l. per annum*, and contracted debts

1701.

to the amount of 8000*l.* beyond the value of his personal estate, and made his will of the import stated by appellant, and moreover, that he left a legacy of 5*l.* to appellant, and willed that all his debts should be paid by his executors; and that the four executors proved the will, and took upon them the payment of the debts; and that appellant had brought his bill to recover the whole estate, suggesting that the will was obtained by fraud, and when testator was not *compos mentis*, though in other parts of his bill he seemed only to aim at the surplus, on pretence that it was devised in trust for him, and ought to enure to his benefit as heir at law; and stated that appellant was but testator's cousin german; and that he might and ought to have gone to a hearing on the constructions of the will without any examination, but instead thereof examined many witnesses to set aside the will, which obliged respondents to examine, on their part, to support the will; and that it was fully proved that testator greatly respected his executors (three of whom were his own uncles) and that appellant had quite lost his favour; and that he had got leave to add an interrogatory to examine one *Smith* and *Mason* as to *Cane's* discourses touching the will, and afterwards, by surprise, and without notice, obtained the order of 6th *February*, 1698, for enlarging the interrogatory so as to extend it to testator's discourses, and to re-examine *Smith* thereto; which last order was three days afterwards, after long debate, discharged the court, being satisfied that no such examination, on enquiry, ought to be permitted in relation to a will in writing, and that *Smith* had been before examined at the commission to that very matter; and that on the hearing at appellant's instance, the court directed the validity thereof to be tried at law, and that Mr. *Cane*, who drew it, should be examined on interrogatories, for discovery of the draught, and instructions, which he was, and appellant afterwards declined the trial, and admitted the will, and, 14th *June*, 1699, brought the cause to be heard as to the pretended trust: Whereupon, and upon reading the will and proofs, and long debate, the court declared they saw no cause to give the appellant any relief, and dismissed his bill; which dismissal respondents insisted was just and equitable, and that there could hardly be found words which more expressly excluded any idea of such a trust, presumption;

tion, or implications, as appellant aimed at, than the words made use of in this will; and further insisted that the order of the 6th *February* was justly discharged, for that it was not consonant to the laws and statutes of this realm, that any examination or parol-proof should be admitted to alter the construction of a written will concerning lands, and that it was against practice, and would be of dangerous consequence to all men's estates, and a great inlet to perjury, if witnesses once examined were permitted to be re-examined to the same matters.

Die Lune, 5^o Maii, 1701. Upon hearing council Prec. on this appeal, it was ORDERED and ADJUDGED that Chan. 94. the same should be dismissed; and that the order of 2 Eq. Ab. dismissal, and the other order therein complained of, should be affirmed. *Lords Journ.* vol. xvi. p. 430. 434. Vin. Ab. xi. 152. 419.

1701.

Temperance Kirby, Spinster, Executrix of Dame *Jane Ormsby*, deceased, } Appellant.

Gilbert Ormsby, Esq.

Respondent.

THE appellant made this case: That the testatrix *Lady Ormsby*, upon her marriage with *Sir Edward Ormsby*, had a jointure of near 500*l.* a year settled upon her in lands in the county of *Limerick*, in *Ireland*, and that after *Sir Edward's* death, respondent, his brother and heir at law, was anxious for the possession of the jointure lands, and had previously articulated with one *Thady Quin*, an Irish papist, to make him a lease of some part of them for a considerable term; and prevailed on *Lady Ormsby*, in 1684, to make him a lease for ninety-nine years (if she lived so long) of the said lands, at 300*l.* *per annum*, rent payable half-yearly, at *May* and *All Saints*, above taxes and reprises whatsoever, which was *Lady Ormsby's* only support and maintenance; and for due payment thereof, besides the usual clauses for distresses, there was a clause for the payment of twenty shillings per week, *nomine pene*, whenever the rent should be behind, and unpaid after any of the days of payment; and for her further security of recovering all arrears, respondent gave her a bond of 1000*l.* for performance of all said covenants and agreements; and that said *Thady Quin* occupied parcel of the lands, and one *Plummer* other parcels, and respondent duly paid the 300*l.* *per annum* to *Lady Ormsby* up to *May*, 1688, but from thenceforward not one farthing had at any time been paid to her, and that she died about 11th *October*, 1691; so that at her death six half-yearly payments were in arrear; and that appellant, her executrix, having taken probat of her will, had for recovery of those arrears put the said bond in suit against respondent, who, to avoid such suit, exhibited a bill in Chancery in *Ireland* for an injunction; but being disappointed thereof, deserted his bill in Chancery, and filed a similar bill in the Exchequer, and soon after appeared himself to another bill filed against him by his tenant *Thady Quin*, to be relieved against arrears of rent, on pretence of great losses suffered in the late wars of *Ireland*; and that both these causes were brought

brought to hearing at the same time; and on respondent's bill a decree was made, for an entire abatement of all arrears from the feast of *All Saints*, 1688, unto Lady *Ormsby's* death; and that respondent should pay 150*l.* for one half-year's rent due at *All Saints*, 1688, and costs at law, about 2*l.* 10*s.* 8*d.* and that upon payment thereof the lease and bond should be delivered up, and a perpetual injunction was decreed to stay any further proceedings at law; to be relieved against which decree appellant now appealed, and insisted, that the arrears from *November*, 1688, ought not to have been struck off on account of the common calamities in that kingdom, because there were not any disturbances in the county of *Limerick*, where these lands lie, until after the battle of the *Boyne*, in *July*, 1690; and further, that though *Thady Quin*, the tenant, had been plundered of all, yet it could not be reasonable that all allowances to be made to him by the heir at law, should be deducted from the jointress only; for that landlords and tenants, land-inheritors, and those having but particular estates, are usually in such cases, and in justice, ought to be brought into a sort of average loss, where each may bear a part; but that by this decree, *Quin*, the tenant, had all the rent, 230*l.* *per annum*, allowed him for pretended losses by rapparees; *Ormsby*, his landlord, had 300*l.* *per annum* allowed to him for making that allowance to his tenant *Thady*, and Lady *Ormsby*, the paramount, must pay all, and bear the whole loss herself; and further, that even though it might be thought just to take from Lady *Ormsby* the whole rent for all the time the troubles were in the county of *Limerick*, yet that by no rules of equity could the arrears be deducted, which were due in those half years incurred before the battle of the *Boyne*, when there was no disturbance whatsoever in that county, but, on the contrary, a free trade with *France*, to the great advantage of that county; and that appellant ought, at all events, to be paid all arrears up to *May-day*, 1690; and that if it should appear that *Thady Quin* might have waived his possession, under a covenant in his articles, and would not, but preferred to continue tenant, notwithstanding that contingency of war, against which he had provided, had happened, it must be presumed that his lease was, notwithstanding that contingency, an advantageous bargain, and that such lease being now decreed him for 1000 years to come, it could not be conceived that he had been any loser

1701.

loser in the main, and that therefore the allowances made to him could not be looked upon otherwife than as so much given him, in order to be deducted from appellant; and further insisted, that the court of Exchequer, by decreeing her even 150*l.* of the arrears, had adjudged that she had good cause to put the bond in suit, and ought therefore with that sum to have decreed her costs; and that appellant being only an executrix, could not remit any arrear, but was compellable to sue for what was due to her testatrix; and that she had been brought by respondent into a very chargeable suit in equity, only for taking a legal method for recovering her testatrix's debt, and therefore prayed to be allowed her full costs; and that as that rent was Lady *Ormsby's* only subsistence, and as even by the decree itself 150*l.* is allowed to have been due since *May*, 1688, and as there had been frequent demands made for the arrears, and no tender or payment, appellant further prayed, that interest might be allowed her, not only for the 150*l.* but for the other arrears.

James
Montague.

The respondent, in affirmance of the decree, made this case: That *Robert Ormsby*, Esq. had issue *Edward* (afterwards *Sir Edward*) his eldest, and respondent his younger son; and upon a marriage treaty between *Edward* and *Jane Murray*, (appellant's testatrix,) her portion was represented, and article to be 3500*l.* of which 800*l.* only was actually received, great part of it consisting in a debt due from King *Charles* the First; the marriage took effect, and settlements were perfected, whereby the lands of *Robert*, in the county of *Limerick*, were settled on *Edward* in present maintenance, and on the said *Jane* for her jointure, remainder to their issue male, remainder over to the respondent for life, and so to his sons in tail-male; and at the time of the settlement the lands were in lease for lives and years, determinable upon lives, with provision for renewal to *Thomas Bentley*, *Mark Harrison*, and *Richard Plummer*, three of the tenants; and that on *Robert Ormsby's* death, in 1664, *Sir Edward* entered, and confirmed the leases then in being; and afterwards (his wife joining with him) renewed *Plummer's* lease for three lives, at 107*l.* per annum, and *Harrison's* at 25*l.* per annum; and the rent of *Bentley's* being 150*l.* per annum, the whole jointure lands yielded but 282*l.* per annum, and that *Bentley* and *Harrison* were backward tenants, and committing

ring waste; and Sir *Edward*, who had no children, nor prospect of any, proposed that respondent should purchase *Bentley* and *Harrison's* interests, and take leases himself of their farms at their rents, which respondent accordingly did; and afterwards, in 1678, at the request of Sir *Edward* and his lady, contracted to make a lease to *Thady Quin*, Gent. of *Bentley* and *Harrison's* farms, with 300 acres contiguous, of his own estate, for 1000 years, at 23*ol.* rent, above quit-rent and taxes; and *Quin* entered, and continued tenant till Sir *Edward's* death in 1684; and that dame *Jane*, though she had insisted upon, and got from *Quin* a present of a pair of coach horses, for her consent after Sir *Edward's* death, attempted to avoid the leases, and that to accommodate those differences, respondent accepted a lease from her of all her jointure lands, at 30*ol. per annum*, payable at *Dublin*; and that there was a *nomine pené* of twenty shillings a week, and respondent gave 100*ol.* bond, for performance of the covenants in the lease; by which bargain, after deducting all expenses, 12*l.* only remained to respondent for his own 300 acres, worth 5*ol. per annum*, and for his trouble; and that respondent paid the rent punctually till 1st *May*, 1688, inclusive, and before *November* following *Ireland* was in such confusion that no protestant subject could make any benefit of his lands; and, in *December*, respondent, with his family, left his estate and fled into *England*; and in the *May* following King *James* arrived in *Ireland*, and respondent was attainted by his parliament, and his real estate, 1600*ol.* *per annum*, and a personal estate, above 6000*ol.* seized for the said King's use, and *Plummer* the under-tenant taken prisoner, plundered and ruined, and under that King's act for repealing the act of settlement, the old proprietors entered on the jointure estate, and that the county of *Limerick* was one of the earliest in the kingdom where the protestants were disturbed, and the last reduced, and that these lands particularly suffered more than others in that county, being a thoroughfare from *Limerick* to *Kerry*: And that appellant, in 1692, after dame *Jane's* death, empowered *John Lowther*, Esq. to demand the arrears due at *Lady Ormsby's* death, and to agree about it as he thought fit; and that there was a reference thereupon to Sir *Richard Levings*, and *Robert Rochfort*, Esq. who delivered their opinions (but did not make a conclusive award) that 15*ol.* should be paid Mr. *Lowther* for appellant's use, for the half-year's rent due

due November, 1688, and no more; and that appellant might distrain or receive what she could from the under-tenants, in her own or respondent's name: And that respondent accordingly, for that purpose, immediately lodged the 150*l.* with Benjamin Burton, a banker in Dublin, and tendered it to Mr. Lowther for appellant, long before she had taken probate, which, though not intitled to recover by law, she might justifiably receive and discharge, and which Lowther, by her directions, refused to accept, and a suit was commenced against respondent upon the 1000*l.* bond, for an injunction to stay, which respondent exhibited his bill in the Exchequer, in Ireland, as stated by appellant; who in her answer admitted respondent's losses, and the sufferings and ruin of Plummer, but insisted that Quin, being a papist, had not suffered, and that therefore his rent ought to be answered to her, and admitted her power to Mr. Lowther, and that she refused to accept the 150*l.* relying on her remedy at law for the whole arrears; and that immediately on her answer respondent had sued Quin for an account of the rent during his enjoyment; and that Quin exhibited his bill for relief against respondent, and after divers witnesses examined, and proof of his losses made by Quin, both causes were heard together before the Chancellor and three barons of the Exchequer, and the decree stated by appellant was made; and before the decree could be made up, the respondent was served with an order upon the appellant's petition and appeal; but respondent insisted the decree was well grounded, and agreeable to equity and justice; for that it was fully proved that the troubles began in the county of Limerick in December, 1688, and continued during the war, and that the under-tenant Plummer was ruined and lost all; and neither he nor respondent could enjoy or make any rent, and if they had, must have received it in instalments; and though Quin did enjoy some time, yet he had lost all by following the Protestant party; and that respondent's allowances to Quin were for rent that fell due only after Lady Ormsby's death; and that there was no proof that respondent received one penny of Quin from November, 1688, till November, 1691, but 50*l.* in instalments; and that there could be no reason for interest or costs, it being appellant's own fault that she refused the 150*l.* offered, and deposited for her, before she had any right of action; and insisted that allowance of interest for rent, upon the bond for performance of covenants

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covenants, or on the *nomine pane*, was against the general rule of the kingdom, and many adjudged cases; and that in the rebellion of 1641, no interest was allowed in *Ireland*, even upon bonds and judgments, for money lent from 1641 to 1654, and from 1654 to 1656, (though the kingdom was entirely reduced) only half interest was allowed; and that the act of resumption cleared all interest and rent during the war, which was thereby declared not to have determined till *Easter*, 1692, and that the King had no quit rents till *Michaelmas*, 1692; and that this decree was solemnly pronounced by a full court, by men of known abilities, acquainted with the circumstances of the kingdom, and of the several parts of it where the burthen lay most heavy, after a full examination, and were unanimous in the decree; and that shaking of this decree would, in effect, at once unsettle the whole kingdom, and put all again into confusion.

St. John
Broderick.

Die Martis, 6^o Maii, 1701. The Lords heard council on this appeal on this point, whether the court of Chancery, in *Ireland*, had proper parties before them, whereby the decree complained of was rightly founded; and whether *Quin*, the tenant of *Ormsby*, should not have been a party, though the depositions taken in his cause were made use of by consent? And the Lord Keeper told the Council, that the Lords were under some difficulty in this matter; for if appellant proceeded, those depositions must be used, otherwise there would be nothing to justify the reversal of the decree against appellant; and if those depositions should be used, the Lords doubted whether that he had not so united the causes, as that appellant ought to have brought *Quin* before the Lords as well as respondent *Ormsby*: Wherefore adjourned the further hearing till 15th *May*. — *Lords Journ.* vol. xvi. p. 669.

Note. Nothing was done in this cause on the 15th of *May*, nor afterwards (as I find), save two adjournments; one *Mercurij* 28^o *Maii*, to *Monday* next, and from thence on that day to *Friday*. — *Vid. Journ.* vol. xvi. p. 711, 717.

June

1701.

Jane Luke,

Appellant.

Shem Bridges, Esq. and Samuel
 Chrissy, and others, Executors of } Respondents
 Thomas Chrissy, Esquire, - - -

THE appellant made this case: That Sir Charles Bickerstaffe, 26th February, 1680, mortgaged the higher and lower Culverdens to Sir John Marsbam, Bart. for 250*l.* and that he and his son at several times afterwards, on the same security, advanced so much more money as came to 1100*l.* and that respondent Bridges, in 1685, paid the 1100*l.* and took an assignment of the mortgage, and 20th April, 1687, joined in the sale of 19 acres, the best part of the mortgaged premises, and received 100*l.* of his principal, all arrears of interest being then paid; and in Trinity term, 1689, filed his bill in Chancery against Sir Charles for foreclosure, 20th January, 1689, obtained a decree for foreclosure, unless the money paid by the last day of Michaelmas term then next; and that the master, 24th October, 1690, reported 1243*l.* 13*s.* 6*d.* to be due; and the estate was sold under an order, dated 24th July, 1691, to a Mr. Hungerford, who was reported the purchaser, at 600*l.* after which respondent Bridges caused Sir Charles to be arrested on his collateral bond, or on his covenant, and held to special bail, either for the whole mortgage money, or for the deficiency after the sale, and Sir Charles turned himself over to the fleet; but afterwards, 19th February, 1691, paid Bridges 600*l.* and so got out of the fleet, there then remaining due to Bridges 643*l.* 16*s.* 6*d.* according to the master's report, Sir Charles being then more indebted than all his estate could pay;—and further stated, that appellant had then 1000*l.* her whole portion, paid in, which was, in 1692, received by Thomas Chrissy, who then lodged at one Thompson's, a money scrivener in new Palace-yard, Westminster; and that Chrissy, of his own head, without appellant's privity, or the advice of council, lent the 1000*l.* on this mortgage, of which he took an assignment, dated 8th March, 1692, and afterwards wrote word of it to appellant, who was then 40 miles from London; and that though the money was paid, and Bridges gave a receipt for the whole 1000*l.* yet he

he swears he received but 79*ol.* no more being due to him, so there remained 21*ol.* not received by Sir *Charles Bickerstaffe*; and that respondent *Bridges* had credit in *Jobnson* the goldsmith's books for the whole 100*ol.* and that the nineteen acres aforementioned were excepted out of the assignment; and that a bond was prepared for Sir *Charles*, and *Stewart Bickerstaffe*, Esq. his eldest son and heir, to seal for 200*ol.* conditioned to pay the 100*ol.* and interest, and for performance of the covenants in the assignment, but that the son never executed it, but that *Philip Bickerstaffe*, Esq. executed a bond, in the penalty only of 1200*ol.* for payment of the 100*ol.* and interest, in case the same were not paid in a year; and that in about three months after *Christy* went into the country and acquainted appellant what he had done, who was surpris'd and dissatisfied at it; and desired both principal and interest might be paid in at the year's end; and that she received some writings relating to the title, and 68*l.* interest, but received these from *Christy*, never having even seen Sir *Charles Bickerstaffe*; and that it was fully proved that *Christy* was sensible of the injury he had done appellant, and repeatedly promised to make her satisfaction, but did not in his life time nor by his will; wherefore appellant brought her bill in Chancery against Sir *Charles Bickerstaffe*, *Philip Bickerstaffe*, and the executors of *Christy*; who answered, and witnesses being examined, the cause was heard before the Lord-keeper, 22*d February*, 1700, who declared he thought neither *Bridges* nor *Christy* had done well in this matter; but did not think there was upon the whole sufficient to ground a decree for both or either of them to make appellant satisfaction, and dismissed the bill without costs; which decree of dismissal appellant insisted ought to be reversed, because it appeared by *Bridges*'s answer, that 79*ol.* only was due to him at the time of the assignment, and that he ought not to have given a receipt for more, nor to have had credit in *Jobnson*'s books for more; but Sir *Charles* ought to have given a receipt for the 21*ol.* so that it is a violent presumption that the 21*ol.* was swallowed amongst the persons concerned in lending the money, and that the receipt and credit were contrived to colour the fraud; and that *Bridges* concealed the decree of foreclosure and the prosecution at law, and that he had received 600*ol.* of the money, and that *Hungerford* was reported the purchaser at 600*ol.* and knew it to

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to be a defective security, and yet imposed it on *Christy* without discovering the defects; and that it was agreeable to equity and good conscience that *Bridges* should take a re-assignment of his security, and pay appellant her 1000*l.* with interest and costs; and that *Christy* was debtor, and accountable to her at first for the 1000*l.* which he actually received of her money; and insisted that his putting the money out without acquainting her or any of her friends, or advising with council, did not, neither did her receiving the mortgage deed, and 68*l.* interest, discharge him from her original demand against him; and that it was inexcusable neglect in him to accept of this mortgage without making necessary searches and enquiries, though it turned out that Sir *Charles* then owed near 10,000*l.* upon statutes, judgments, and recognizances, which common caution ought to have discovered; but that *Christy* never enquired even into the value of the mortgaged estate, nor took any care in applying the 1000*l.* but, as pretended, paid the whole to *Bridges*, though only 790*l.* remained due to him; and that *Christy* had, himself, promised to make appellant full satisfaction, and had neither left child unprovided for, nor creditor unpaid, and had left an estate of near 20,000*l.* and though it may be objected that *Christy* had left appellant 20*l.* *per annum* by his will, yet this 20*l.* *per annum* was not to take effect in possession till after his widow's death; nor do respondents, his executors, by their answer, insist on that matter.

Sa. Black-
erby.

The respondents, the executors of *Christy*, on the other hand stated: That their testator, *Thomas Christy*, was married to appellant's sister, and that appellant, in 1692, desired him to receive and put out at interest for her 1000*l.* which was then to be paid in; which, without other motive than his affinity and respect for her, he undertook; and that the estate of Sir *Charles Bickerstaffe*, at *Tunbridge*, then in mortgage for 1000*l.* (as alleged) to respondent *Bridges*, and which had been assigned to him by Sir *Robert Marbham*, was proposed as a security, and Mr. *Christy* being acquainted with, and having a good opinion of *Philip Bickerstaffe*, Esq. with whom he sat in parliament, and who was contented to be bound with Sir *Charles* his brother for the money, and Sir *Robert Marbham* and Mr. *Bridges*, both fix clerks, being reputed men of caution and understanding, and the security being to be transferred for the same sum of money

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ney then upon it, he accepted the security, and in March, 1692, lent the money, and took the assignment of the mortgage, and also the bonds of the said Sir Charles and Philip Bickersstaffe to appellant, and delivered her the writings, except some old leases (not material to the title) which he left in *London*, and which were after Mr. *Christy's* death delivered to appellant by one of the respondents: And that appellant accepted the security, and received the interest for some time; but afterwards disliking the security, in March, 1698, petitioned the parliament that Mr. *Bickersstaffe* might waive his privilege, and sued him: That *Thomas Christy* died 1st July, 1697, and appellant, 13th July, 1698, commenced her suit in Chancery against *Bridges* and respondents, charging *Bridges* with fraud in not discovering the deficiency of the security, and respondent's testator with negligence, in putting out the 1000*l.* and demanded satisfaction against both; alleging that *Christy* had often expressed his concern that the money, was like to be lost, and that he should think himself obliged to make her some satisfaction by his will, or to some such effect: And that upon a full hearing appellant's bill was dismissed, as well against *Bridges* as respondents; who insisted that as against them the appeal ought to be dismissed with costs, because there is no pretence or suggestion of fraud in *Thomas Christy*, who had transacted the security as an act of friendship only, without reward or recompence; and that therefore he ought not to be accountable for the misfortune: And that *Christy's* expressions of making appellant satisfaction out of his estate, were merely expressions of concern for her misfortune, but could not in any court of law or equity oblige him who had done her no wrong, to make any reparation; however he by his will gave the appellant 20*l. per annum* for her life, after his wife's death, and gave her nephew (whom he knew she intended her heir) a farm of 60*l. per annum*, and the value of 2000*l.* more into her family; without any obligation upon him so to do.

J. Selby.

And for the respondent *Bridges*, this case was made: That Sir *Charles* had originally made the mortgage for 250*l.* to Sir *John Marsham*, who and his son Sir *Robert Marsham*, after his decease, advanced more money till it came to 1100*l.* principal money; and that Sir *Robert*, and Sir *John Marsham*, executors of the first

{ 1701. } first mortgagee, by Sir *Charles*'s direction, assigned the mortgage to respondent *Bridget*, in consideration of 1100*l.* really and actually paid by him, and that he, 20th *April*, 1687, believing and being persuaded the premises were an ample security, joined with Sir *Charles Bickerstaffe* in the sale of nineteen acres, parcel thereof (the whole being 150 acres in *Tunbridge* and *Spelthurst, Kent*,) to or in trust for Sir *Thomas Fitch*, and thereupon received one year's interest, and, 106*l.* part of his principal money; and that Sir *Charles Bickerstaffe* neglecting to pay his interest, respondent brought a bill and obtained a decree to foreclose; and that respondent's debt was stated at 1243*l.* 13*s.* 6*d.* in *October*, 1690, and Sir *Charles*, from time to time, obtaining orders to enlarge the time for payment of the money, respondent arrested him on his bond for performance of covenants, and by that means got 600*l.* in part of his debt; and that in 1692, Sir *Charles Bickerstaffe*, without respondent's privacy or assistance, procured 1000*l.* from *Christy* (which it seems was appellant's money) and thereupon Sir *Charles* and *Christy*, without consulting respondent or any council for him, prepared an assignment for respondent to execute, and made it in consideration of 1000*l.* paid to the respondents, who took no further notice than to see that the nineteen acres sold away, were excepted, and executed the assignment, and thereupon *Christy* paid him 790*l.* (which was all that was due to him) and paid the residue 210*l.* to Sir *Charles Bickerstaffe*, and that respondent considered that appellant's name was made use of in trust for *Christy*, and that though appellant admitted she had notice that the money was in danger within three months after the lending, yet she did not till after *Christy*'s death, and six years after respondent had assigned, bring her bill against respondents, but then for the first time charged a contrivance between respondent and *Christy*, to defeat appellant of her 1000*l.* and praying that some of them might repay her; but it appearing to the court that the matter was transacted fairly, her bill was dismissed as against the respondents, but she had a decree against Sir *Charles Bickerstaffe*, to foreclose him of the equity of redemption: And now appellant objects that the estate is not of value to answer her money, a Mr. *Hungerford* having been allowed the best purchaser for 600*l.* but respondent shewed that *Hungerford* had bid merely to quicken Sir *Charles* to raise the money, but was never reported the purchaser; and respondent, far from thinking

ing 600*l.* the value, after he had joined in the sale of the nineteen acres, offered Sir *Charles Bickerstaffe* 1200*l.* for the estate, who refused to take it; the ground rents payable by the builders thereon being 56*l.* 10*s.* *per annum*; and that respondent knew not of any precedent incumbrances, and though it appeared there were some precedent statutes acknowledged by Sir *Charles*, the same were satisfied, and assigned to persons who purchased other part of Sir *Charles*'s estate to protect his or their purchases; and that there was not the least unfair proceeding between *Chrissy* and respondent.

Die Mercurii, 7^o Maii, 1701. After hearing council upon this appeal, it was ORDERED and ADJUDGED by the Lords, that the petition and appeal be dismissed, and the decree complained of affirmed.—*Lords Journ.* Eq. Ab. vol. xvi. p. 669.

708. viii.
xix. 291.

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James

1701.

James Farrel, Infant, by his next } Appellant.
Friend, - - -

John White, Esq. and *Katherine* his } Respondents.
Wife. - - -

Case 29.

THE appellant stated, that the object of this appeal was to have the benefit of mortgages for 1000*l.* and 416*l.* made by *Robert Nangle* to appellant's late father, *Fergus Farrel*, and particularly to have the sum of 1778*l.* 2*s.* 9*d.* paid into the Court of Chancery in *Ireland*, for redemption of those mortgages by *Samuel White*, a subsequent mortgagee of the same estate, and that his title thereto was as eldest son of his father, by *Ann Lyons* his mother, (both deceased) whole portion of 2500*l.* was according to articles before her marriage, to be invested in the purchase of lands, to be settled to the use of himself and his wife for their lives, remainder to the heirs-male of their bodies; and that this mortgage money was part of that 2500*l.* and that the respondent, *Katherine White*, was a second wife of *Fergus*, and having got administration to him claimed the mortgage money as part of the personal estate of *Fergus*; and that appellant had brought his bill in Chancery in *Ireland*, against respondent's *White* and wife, to have the mortgage money by virtue of the marriage articles; and that the bill was dismissed on the hearing, 8th June, 1700, and that on a re-hearing, 26th June, 1700, appellant was decreed to have a moiety of the surplus of this mortgage money after all debts and charges paid, and the other moiety to be divided between the respondent *White* and his wife, and her child by *Farrel*, her first husband, and that such surplus would be little or nothing, and that this 1778*l.* 2*s.* 9*d.* redemption money, had been brought into court by the subsequent mortgagee in another cause, wherein he was plaintiff against the said *White* and wife, on payment of which the court put him into possession, and decreed the mortgage to be assigned by him to them; and that appellant was no party in that suit, nor did he controvert that decree, but prayed that *White* and wife might be enjoined from receiving that money out of Court; because if appellant succeed in his cause, that money will belong to him; and stated further,

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further, that the mortgage deeds were in the hands of one *Dowling*, who pretended that appellant's father, *Fergus Farrel*, deposited them with him as a security for a debt of 265*l.* and that *White* and wife had lately got a decree against *Dowling*, to deliver the deeds to them on payment of that money and interest; and that appellant was no party to that decree; and that *White* and wife ought to be enjoined from taking benefit thereof, for that those deeds belonged to appellant and not to *White* and wife; and insisted that the decree made in his cause ought to be reversed, and the mortgage money in court paid, and the deeds delivered to him; and that the money ought not to be deemed part of his father's personal estate; and that appellant's father ought to be considered as a bare trustee of that money to be applied according to the marriage articles; and that placing it upon a mortgage in fee simple, ought in equity to be construed as an investment of it in land, according to the intention of the articles: and that none of the contending parties could have benefit of the redemption of the mortgage without a conveyance from appellant, to whom the fee simple and inheritance of the premises is defended; and that under all the circumstances of this case, the redemption money and mortgage deeds ought to go with and belong to the estate in law, in the appellant; and though it be objected that appellant has all his father's estate in *Ireland* under the marriage settlement, and so is provided for, yet that estate was covenanted to be worth 600*l.* *per annum*, and is not now William Dobyne, set for above 100*l.*

The respondents on the other hand shewed, that about 1683, *Fergus Farrel* lent *Robert Nangle*, or paid for him as his surety divers sums, amounting to 1416*l.* for securing which, *Nangle* mort gaged to *Farrel* and his heirs *Ballycorky*, and other lands in the county of *Westmeath* and *Longford* in *Ireland*; and that one *William Smith* had a subsequent mortgage on *Nangle's* estate, and he dying, respondent, *Samuel Smith*, his son and heir, in 1694, exhibited his bill against *Farrel*, to be let in to redeem, and for an account of the profits, and obtained a decree accordingly; and that appellant's mother died in 1689; and, 1692, *Farrel*, his father, married respondent *Katherine*, and had by her a son which was dead, and a daughter living; and, in 1695, was killed in *Flanders*, and dying intestate, respondent

1701. *Katherine* administered, and became intitled to the money due on *Nangle's* mortgage as part of his personal estate; and that respondent, *Smith*, revived his cause against her; and upon stating the account between those parties, 1698*l.* 2*s.* 9*d.* appeared due on the mortgage, 25th *March*, 1699, on payment whereof respondent *Katherine* was decreed to deliver up the possession, and assign the said mortgage to respondent, *Smith*; and that *Farrel*, about 1694, borrowed 265*l.* from respondent *Dowling*, on his bond or judgment, and for further security deposited the original mortgage, or made some assignment thereof; and *Dowling* refusing to deliver up the said deed, unless by direction of the court, respondents, *White* and wife, about 1699, exhibited their bill against him in the said court, and obtained a decree that he should deliver it on payment of what should appear due to him; and that appellant, about *Easter* term, 1698, exhibited his bill on pretence that the money so lent by his father, was part of his mother's marriage portion, as stated by appellant, which respondents by their answer denied, and said they were strangers to that settlement, and insisted that the said mortgage, though in fee, being only a security for money, was a chattel in equity, and belonged to respondent, *Katherine*, as administratrix, and liable to *Farrel's* debts; and that appellant's cause was then heard before the judges, 11th *May*, 1700, who after time to consider, decreed as stated by appellant; and that on a re-hearing, such further decree as before stated was made, and respondents insisted that though it was a mortgage in fee, yet it ought in equity to be construed a chattel, especially where creditors are concerned, and that it was not proved in the cause that the mortgage money was any part of the marriage portion; and though it were, yet the settlement was voluntary and after the marriage, and ought not to affect creditors.

R. Turner.

Die Luna, 12^o *Maii*, 1701. After hearing council upon this appeal, it was ORDERED and ADJUDGED by the Lords, that the same should be dismissed, and the decree and orders appealed from affirmed. *Lords Journ.* vol. xvi. p. 678.

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1699.
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George, Earl of *Warrington*, - Appellant.

Sir James Langham, Knight and
Baronet, and *Ann Tipping*, Wi- } Respondents.
dow, - - -

THE appellant made this case : That an agreement was entered into between respondent, *Sir James Langham*, and appellant's grandfather, *George*, Lord *Delamer*, for a marriage between the Hon. *Henry Beath*, his son and heir apparent, and respondent's only daughter, *Mary*, with whom respondent was to give 20,000*l.* portion; and that articles of agreement, dated 17th *June*, 1670, were accordingly drawn up privately, and without the aid of council, and executed between appellant's grandfather and respondent, for the marriage to be had on the 7th of *July* then next; and thereby respondent covenanted to pay the grandfather the 20,000*l.* viz. 10,000*l.* within three months after the marriage, and 10,000*l.* within six months after respondent's death: And that appellant's grandfather thereby covenanted with respondent, on payment of the first 10,000*l.* to settle on his son and respondent's daughter an annuity of 1500*l.* to be secured out of lands of greater value, for present maintenance, and for the daughter's jointure, whereof 400*l.* was during the coverture to be paid to her for her separate use; and that on payment of the other 10,000*l.* he would add 600*l.* a year to the 1500*l.* and it was agreed that appellant's grandfather should have the same power he then had over his estate, to provide for his younger children as he might think fit: That the marriage was soon after had, and a settlement accordingly executed by the grandfather, and the first 10,000*l.* paid : That the grandfather intending a provision for his younger children, by indenture, dated 21st *September*, 1680, charged several of his manors, lands, and tenements, with divers large sums of money, and directed that the remaining 10,000*l.* should be paid to his four trustees, to be by them applied in aid of the charges so imposed, and in case of his estates; and that the four trustees were dead, and that the respondent, *Ann*, was administratrix, with the will annexed of the survivor : That *George*, Lord *Delamer*, had died about fourteen

1699.

fourteen years ago, leaving said *Henry* his eldest, appellant's father, who was afterwards created Earl of *Warrington*, and died about five years ago, leaving appellant, his eldest son and heir, under age, upon whose death the estates charged descended upon appellant; and said *Mary*, appellant's mother, having died about eight years ago, appellant was intitled in law and equity to the remaining 10,000*l.* to disengage his estates from the charges so imposed by the grandfather, and divers others imposed by Earl *Henry*: And that appellant had applied to respondent, his grandfather, to have it paid at a reasonable discount, or to have security given for it payable after his death; and that this was reasonable, as respondent was very aged and infirm, and had lately married one of disproportionate birth and fortune, who was waiting woman to his former wife, and had made some voluntary settlement of his real and personal estate for her benefit, and was about to dispose of the residue of his property, so that the future payment of the 10,000*l.* was in manifest danger of being frustrated; and that appellant had filed his bill in Chancery to have the 10,000*l.* secured accordingly, but that upon the hearing his bill was dismissed, there being (as alleged) no precedent for such a bill: But appellant insisted that, it having been agreed that there was a present debt of 10,000*l.* due to him, though the time of payment not in strictness come, it was but just that the debtor should give caution, that when the time came about the money might be recoverable; and that respondent's aliening his estate, was a declaration of his purpose to disappoint the payment; and that such a disabling of himself to make it good, ought to be considered as a present breach of the agreement: And that the articles agreeing to pay the 10,000*l.* by a reasonable construction, amounted to an agreement to leave a sufficient estate whereout it might be paid; and that these articles having been drawn privately in the family, without the assistance of council, ought to be aided according to the apparent intent of the parties; that it was but reasonable respondent should be restrained from frustrating his own solemn agreement, by any wilful act; and that the word covenant in the articles, was not intended as a security to be relied on, but as a more solemn engagement, the parties then relying wholly on each other's honour: And further insisted, that appellant having his estate charged higher in prospect of this 10,000*l.* than otherwise it would, and

and it being to be applied in case of his estate, he was interested to see that the payment should not be prevented.

The respondent, on the other hand, shewed, that the marriage was brought about by the importunity of appellant's grandfather, and that the articles had been drawn by the grandfather's directions, and by his agent, and that appellant's bill did not suggest any agreement for payment of the said 10,000*l.* before respondent's death, nor for security in the interim; nor that respondent was less able to perform the agreement than when it was entered into; and that the grandfather and father had accepted these articles as the only security, and that they and appellant had for near thirty years rested satisfied therewith; and that respondent's estate was now better than when the articles were entered into, and that he would never have agreed to the marriage, had any security besides the articles been required; and that the grandfather was left at full liberty as to his own estate, and not bound to settle any part save the jointure, in any manner on the issue of the marriage. That the cause was heard 24th *February*, 1698, when the Lord Chancellor, with great clearness, dismissed the bill; and insisted, that though a thousand such cases had been, such a decree as that fought by the appellant never had been made; and that if appellant should prevail, it would be a precedent of extraordinary consequence, appellant desiring the court to make a new agreement for the parties.

T. Powys.
Hen. Po-
ley.

Die Mercurii, 8^o *Martii*, 1698. This petition and appeal brought in. *Lords Journ.* vol. xvi. p. 397.

Luna, 20^o *Martii*. To be heard on *Friday*, 31st *March*.—P. 408.

Jovis, 25^o *Martii*. To be heard on *Saturday*, 1st *April*.—P. 413.

1 Eq. Ab.
132.

Sabbati, 1^o *Aprilis*, 1699. After hearing council this day on the petition and appeal of G. Earl of *Warring*: and the answer of Sir *James Langham* and *Ann Tippling*, it was ORDERED, that the Lord Chief Justice of the Court of Common Pleas do report what was offered by

Prec.
Chan. 89.
Vin. v.
533. xix.
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Cases in parliament.

1699. } by council thereupon, on *Friday* the 14th of *April*,
 instant.—*Lords Journ.* vol. xvi. p. 431.

Veneris, 14^o *Aprilis*. The Lord Chief Justice's
 report to be made on *Friday* the 21st of *April*, instant.
 —P. 437.

Veneris, 21^o *Aprilis*. This report to be made on
Friday the 28th *April*, instant.—P. 446.

Veneris, 28^o *Aprilis*. This report to be made on
Monday next.—P. 456.

Note: Nothing further appears to have been done in
 this cause: but it appears by some of the books in
 which it is reported, to have been agreed between the
 parties; and that the Lords declined to pronounce any
 judgment.

✱ *This case should have been introduced at an earlier
 period, but was mislaid.*

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1701.

Colonel William Lloyd, - - Appellant.

John Cardy, - - Respondent.

THE appellant made this case: That being Colonel Case 31. of a Regiment of Dragoons, he, 10th *March*, 1695, contracted with respondent for furnishing his regiment with 460 Cloaks, at 2*l.* 14*s.* each; and 60 suits (containing coat, waistcoat, and breeches,) at 2*l.* 17*s.* each, according to patterns, of the value of 6*l.* 6*d.* a yard, and to be delivered to the regiment by the last day of that month, and to be paid for out of the off-reckonings of the regiment, commencing 1st *January*, 1696; and to that purpose respondent took an assignment from appellant upon Lord *Ranelagh*, pay-master of the army, for 1425*l.* which they were erroneously computed to amount unto, though they truly amounted only to 1413*l.* which prices though they somewhat exceeded the value of the patterns, were allowed respondent, because he was to take his money out of the off-reckonings of the regiment; and that respondent did not send the cloaks and suits over in *Flanders*, where the regiment was, before the end of *April* or beginning of *May*, when the army was just coming out of winter quarters, and ready to take the field, and then they appeared to be made up of different sorts of very coarse cloth or stuff, not one with another worth 3*s.* per yard, which was sworn by several witnesses; the cloaks not worth above 1*l.* 2*s.* each, and the suits not above 1*l.* 10*s.* each; so that if respondent should be paid 1425*l.* for them, the regiment would be defrauded of 700*l.* but bad as they were, they coming so late, and the regiment having been then lately stripped by the French at *Dixmuyde*, it became impossible to take the field without them; so that appellant having not time to return them upon respondent, was forced to make use of them: That appellant remained about a year in *Flanders* with his regiment, and then coming over, and complaint being made at the pay-office of this abuse, the payment of the 1425*l.* was stopped there until further enquiry; the appellant being censured by the officers of his own regiment, as if he had combined with respondent for his private benefit to defraud his regiment; and respondent endeavouring to arrest him for

for the money, appellant exhibited his bill in Chancery to be relieved, setting forth the badness of the cloaks and suits, and praying he might pay no more than what they were really worth, and that the respondent might take his money out of the off-reckonings as was agreed; and that respondent had answered, that the cloaks and suits in question, were really provided by one *Laurence De la Chambre*, and his partners, to whom respondent had assigned his interest in the 1425*l.* and that they were made up agreeable to the patterns; and that *De la Chambre* and his partners soon after exhibited their bill against appellant, insisting, that they, and not the respondent, made up and provided the cloaks and suits, and demanding of appellant the 1425*l.* assigned to them by respondent: And that this cause was heard the 27th *June*, 1700, before the Master of the Rolls; who decreed appellant to pay the whole 1425*l.* to respondent, with reasonable costs; and respondent to indemnify appellant against *De la Chambre* and his partners: And that from this decree, appellant appealed to the Lord Keeper; and although it appeared by depositions of several witnesses, that the cloaks and suits in question were not worth above half 1425*l.* and that *De la Chambre* and his partners, and not *Cardy*, had made up and provided them, and that *Cardy* had assigned to them the whole 1425*l.* and that they had sued appellant in this court for the same; and that *Cardy* was a bankrupt, and not able to indemnify appellant; and that the cloaks and suits, at the prices agreed on, come 12*l.* short of 1425*l.* and though appellant prayed an issue at law, to try the value of the cloaks and suits in question, and that *Cardy* might there produce the patterns sealed with the appellant's seal, his Lordship denied such trial, and affirmed the former decree, and decreed appellant to pay the whole 1425*l.* to respondent *Cardy*, on the 25th of same month; and caused the word (reasonable) to be struck out of the said decree with respect to costs.

Richard
Turner.
D. Deane.

The respondent, in affirmance of the decrees, stated that appellant had by the articles covenanted to pay respondent the 1425*l.* out of the off-reckonings of the re-giment; and that for performance thereof, they had there-by bound themselves to each other in 3000*l.* penalty, and that respondent had provided the cloaks and suits in every respect answerable to, or better than the patterns, and that the cloth of which they were made

was

was viewed, and approved of by *John Jones*, a person appointed by appellant himself; but that some few of the cloaks and suits were, by *Jones's* order, for haste cut out, and made before the cloth was pressed, which might make them seem coarser than the rest, though they were all of the same goodness, and that all were viewed by *Jones* before they were packed up, and none but such as he approved of sent to *Flanders*, where they were received and made use of; and appellant himself so well approved them, that he, treated with respondent for his cloathing the regiment again for the year 1697, and the respondent and he differed only about 25*l.* for the hautboys cloaths: And that these cloaks and suits having been at respondent's request provided by *Lawrence De la Chambre*, *Thomas Woods*, and *Bosstock Johnson*, respondent assigned to them his interest in the 1425*l.* but payment having been refused at Lord *Ranelagh's* office, because appellant had received it, they threatened to sue respondent for it; and the assignment thus proving ineffectual, respondent expected appellant would have paid him; but that he, to avoid or delay payment, exhibited his bill in Chancery, on pretence of the mistake of 12*l.* and that the cloaks and suits, though long since worn out, were not answerable to the patterns, and not worth within 500*l.* of the money agreed on, and obtained an injunction against respondent's proceedings at law, on giving security to abide the decree. And that respondent had denied the whole equity, and witnesses were examined on both sides, and the cause heard before the master of the rolls, who on proof that appellant had received the money, so by him assigned to respondent, decreed him to pay respondent the 1425*l.* with reasonable costs, to be taxed by Sir *John Franklyn*, one of the masters, or in default thereof, that respondent might put the recognizance in suit, and that on payment thereof respondent should indemnify appellant against *De la Chambre*, *Woods* and *Johnson*: And that afterwards, on appellant's petition, the cause was re-heard before the Master of the Rolls, who, 24th *October*. 1700, affirmed his former decree: And then appellant appealed to the Lord Keeper, who, 1st *March*, 1700, on a full hearing, also affirmed the said decree: And that appellant now further appealed to the Lords, on pretence that he ought to have had a trial at law, to try the value of the cloaks and suits; but respondent insisted

ed it would be unreasonable at this distance of time, to grant such trial after a positive agreement in writing under hand and seal, for the price and sum to be paid; and after full proof that the cloaks and suits were answerable to the patterns, and viewed, accepted, and approved of by appellant's own appointee, and after they had been long worn out, and more especially after appellant had received the money, and had kept the respondent out of his money above three years, when the interest whereof would have amounted to above 250*l*.

John Be-
resford.

Die Veneris, 6^o Junii, 1701. After hearing council upon this appeal, it was ORDERED and ADJUDGED by the Lords, that the same should be dismissed, and the decree and orders complained of affirmed. *Lords Journ.* vol. xvi. p. 725.

This cause is named in Pre. Ch. 171. on a dispute between respondent and his Attorney, but not reported in any book.

Charles

1701

Charles Morris, Esq. and Margaret Morris, Administratrix of Robert Morris, Esq. deceased, } Appellant.

Mary Harrison Administratrix of Godfrey Harrison, deceased, John Harrison, Son and Heir of the said Godfrey Harrison, and others, } Respondents.

THE appellant stated: That by articles, dated 3d Case 32.

April, 1671, a partnership for twenty years was entered into between *Robert Morris, Godfrey Harrison*, and two other persons, for the management of a Glass-house, each party to bring in 800*l.* which was afterwards agreed to be increased 200*l.* a-piece, and by these articles it was agreed, that if any of the partners died, the partnership should continue amongst the survivors, and that the representative of the partner dying should have the benefit of the joint stock, and, proceed thereof as it stood at his death; and that the survivors should within a month after request, account with, and pay such executors and administrators (unless he or they agreed to continue in partnership) a fourth part of the said stock and estate, according to a reasonable value or estimation, deducting a fourth part of the debts then due and also should save them, harmless from all debts then owing by the partners, if they within a month after such account delivered, signified such their resolutions by writing under their hands and seals, and should seal a new indenture of co-partnership to the survivors; and if the joint estate fell short to pay the debts of the partnership, then the partners for the time being should pay them equally out of their own particular estates; that *Godfrey Harrison* died in *September, 1675*, and *Robert Morris*, in *February* following, and that before either died there proved great losses in the partnership, on account whereof 4000*l.* was taken up upon bonds from all the partners, towards which appellants paid 1775*l.* principal money, besides interest; and were also decreed in a suit against them by other partnership creditors to pay 850*l.* more, besides interest and costs, which they had since paid: That respondent, *Mary Harrison*,

1701.

Harrison, pretended she, within a month after her husband's death, demanded an account from two of the partners, but not from *Morris*, who was then ill, and never afterwards concerned himself in the partnership to his death; and that after *Morris*'s death, and not before, an account was delivered unto her, which had been afterwards falsified in several particulars; that *Morris* made a will, and charged his estate with his debts, and his three executors renouncing, administration with the will annexed, was in *April*, 1676, granted to appellant, *Margaret*, so that she could not require an account within a month after her husband's death, according to the articles; and the said appellant, *Margaret*, never came into the partnership, nor acted, nor could she do so unless she had entered into new articles with the surviving co-partners: That though respondents ought to bear equal proportions with appellants of the loss and debts of the partnership, yet respondent, *Harrison*, in *Easter* term, 1686, brought her bill against appellant, and the surviving partners, to have his land freed from the partnership debts; and in *Trinity* term, 1689, appellants likewise exhibited a bill against respondents, to make them pay their proportion of the debts: And, 5th *December*, 1695, both causes were heard before the Master of the Rolls, who decreed the account, so delivered as aforesaid, to be a stated account, but with liberty to falsify or surcharge; and declared that appellant, *Margaret*, continued in the copartnership, and that respondents were not to be sued on any bonds entered into by *Godfrey Harrison*, in relation to the partnership: And 15th *March*, 1696, both causes were again heard before the late Lord Chancellor, who affirmed the decree, with liberty for either side to falsify, or surcharge as they could; which orders appellants insisted ought to be set aside, and respondents decreed to come into the general account, and to bear their proportion with appellants of the loss and debts of the partnership, with respect to the insolvency of the other partners; because if such account was delivered to respondent, *Mary*, it was not delivered till after *Morris*'s death, nor was it given in as a stated account, nor signed by any of the parties; neither could *Morris* be privy to it, he having been extremely ill from *Harrison*'s death till he himself soon after died: And that appellant never acted in the copartnership any more than respondent, and was not capable of demanding an account within

within a month after her husband's death, as she could not take out administration till a quarter of a year after, upon the executors renouncing; and that it did not appear that respondent, *Mary*, had given notice to *Morris*, that she would not continue the partnership, nor that her notice to the other partners was according to the articles, nor that she did ever demand an account from *Morris*, nor that he knew or was privy to the delivery of any to the other partners: And that it did not appear that appellant, *Margaret*, ever concerned herself in the said partnership after her husband's death, neither, in fact, did she intermeddle; and that the account so pretended to be delivered was falsified by the Master's report in several considerable particulars, and yet no provision was made by the Court in respect thereof.

William
Dobyns.

The respondents made this case in affirmance of the decree: That *Robert Morris*, *Richard Hackett*, *Matthias Datchellor*, and *Godfrey Harrison*, entered into the *Glass* partnership, as stated by appellants, and brought into stock 800*l.* a-piece, and afterwards advanced 200*l.* more, so that each partner's stock became 1000*l.* and that by covenants in the articles, the surviving partners were to save harmless from the partnership debts, the executors and administrators of such partner as should die during the partnership, and take no advantage of survivorship; and should within one month after such partner's decease, render an account in writing of the trade and stock to his executors or administrators, as it stood at the said partner's death, and such executors or administrators to continue the said partnership if they should think fit; and that *Godfrey Harrison* had been appointed manager by the other partners, and was to be allowed 100*l.* per annum for his pains: And that by indenture tripartite, dated 20th June, 1673, between said *Richard Hackett* on the first part, Sir *Richard Hawkins* and *John Hawkes* on the second part, the said *Robert Morris*, *Matthias Datchellor* and *Godfrey Harrison* on the third part; the said *Hackett* with the consent of the other partners, assigned his quarter part of the partnership stock and trade to Sir *Richard Hawkins* and *John Hawkes* in equal moieties; and *Godfrey Harrison* was continued in the employment of manager, and by quarterly entries in their books, it appeared they allowed him the 100*l.* per annum, and that *Godfrey Harrison*

Harrison left said employment *Lady-day*, 1675, and delivered to the partners an account thereof in writing; on the foot whereof there was due from him to the other partners only the sum of 16*l.* 11*s.* 11*d.* as appeared by the cash book; and that *Harrison* died 5th September, 1675, having made his will in writing, but no executor; and therefore respondent, *Mary*, took out administration with his will annexed, and (within a month after her husband's death) her son, *John*, being very young, gave the surviving partners notice that she would not continue in the partnership, and desired an account of the stock according to the articles; for which the surviving partners desired time to *Christmas* then next, saying they then should put out their fire, and be at leisure; and that they accordingly made an account, dated 6th January, 1678, and intitled an account current in $\frac{8}{9}$ inter *Robert Morris* $\frac{1}{4}$, *Matthias Datchell* $\frac{1}{4}$, *Godfrey Harrison* $\frac{1}{4}$, *Richard Hawkins* $\frac{1}{8}$, and *John Hawkes* $\frac{1}{8}$; the debtor side being 8713*l.* or. 4*d.* and the credit side 4263*l.* 4*s.* besides the separate debts, which were 377*l.* 1*s.* and the 4000*l.* advanced as aforesaid; and likewise another account, intitled Mr. *Godfrey Harrison*'s account, creditor 383*l.* 11*s.* 1*d.* per contra, debtor 739*l.* 11*s.* 6*d.* and that at the time of making out said accounts, *Robert Morris* was well and abroad, and might reasonably be supposed to have been present there-at, living near a month after the date of the accounts current, though he died before they were delivered to respondent, *Mary*'s friends; and that in such accounts, as to the value of the stock in trade, and the state thereof at her husband's death, respondents acquiesced, though there were therein several great omissions to their prejudice; and that the surviving partners encouraged the partnership creditors to arrest respondent, *Mary*, in several actions for great sums of monies, amounting to 6000*l.* or upwards; to which she pleaded *plene administravit*, and brought her bill in Chancery, but never proceeded farther than bill and answer, as the plaintiffs at law let their suits fall, and threatened to sue respondent, *John*, as heir to his father: And that thereupon *Edward Maplesden*, Esq. grand-father and guardian to respondent, *John*, brought a bill in Chancery to have the partnership books produced, and the two accounts before mentioned proved, and that the account current might stand as a stated account, and respondents not to be compelled to pay farther than

than according to that account: And appellants exhibited their cross bill against respondents and others, praying that the defendants therein should pay their proportions of monies appellants pretended to have paid, and were decreed to pay an account of the partnership; and that respondents, 5th December, 1695, answered to the effect stated by appellant, and examined witnesses in their cause; and on the hearing before the Master of the Rolls, he declared respondents ought not to be charged farther than by the account delivered by the surviving partners; and decreed that account to stand as a stated account, with liberty to the representatives of any of the partners to falsify and surcharge; and that in as much as appellant, *Margaret*, had not given notice to discontinue the partnership, she ought to be considered to have continued it, which would appear by the books which appellants did not produce at the hearing, though served with an order for the purpose; wherefore appellant, *Margaret*, was ordered to be examined on interrogatories before a Master, for the discovery of the books, and other matters relating to the partnership; and that a general account was decreed in appellant's cause, to the end of the partnership trade between the representatives of the partners, exclusive of respondents, and costs reserved till after the account taken: And that appellants, 15th March, 1696, petitioned the late Lord Chancellor for a re-hearing, which was granted; and thereupon his Lordship confirmed the former decree, and ordered the appellants to produce on oath all books relating to the partnership, in their custody or power; and the master to look into them, & examine whether appellant, *Margaret*, carried on the trade, and how the books came to be produced at the re-hearing and not before: And that thereupon respondent, *John*, exhibited before the Master three several sets of interrogatories against appellants, to which the appellants, after great delay, put in improbable and unsatisfactory answers, and had not hitherto produced the debt book, nor any other partnership book, since *Godfrey Harrison's* death; wearied with which delays, respondent, *John Harrison*, ordered his solicitor to proceed upon the account before the Master, and the Master, 21st October, 1699, made a special report, to which the respondents took exceptions, and petitioned the late Lord Chancellor for a day; which being granted, appellants served the respondents

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{ 1701. } with an other order from the said Lord Chancellor, to re-hear the causes when the exceptions came on; and 15th December, 1699, upon the re-hearing the said causes, with the exceptions, and special matter of the said report, the appellant's petition was dismissed with costs, and one of respondents exceptions allowed, and the matter sent back to the Master; but the court did not vary the former decree: And, 20th November last, the Master made his farther report, to which respondents excepted, and it being ready to come on to be argued; appellants, for delay, served respondents with an order to re-hear; which third re-hearing was suspended by the appeal to the Lords: And respondents insisted the decrees ought to be confirmed with costs, for all these vexatious and dilatory proceedings, and that the plain meaning of the agreement was to entitle the executor of the partner dying, to an account within a month after, while matters were fresh in memory, that the executor might not be involved in disputes with the surviving partners, and the executor or administrator might recently know the value of the estate, before the surviving partners had time to secret and embezzle waste, or entangle the same: And that respondents would be utterly ruined, if, at such a distance of time, they should be forced to come to an account *de novo*, and to be left to charge the partner surviving by proof, respondents being utter strangers to the trade, and unexperienced therein.

William
Cooper.

Die Mercurii, 26o Martii. 1701. After hearing council upon this appeal, it was ORDERED by the Lords that the same should be dismissed, and the decree and orders complained of affirmed. *Lords Journ.* vol. xvi. p. 635.

Edward

{
1701.
}

Edward Trelawney, and *Elizabeth*
his Wife, on behalf of *Elizabeth*
Trelawney their Daughter, an In-
fant, and *Daniel Sagittary*, Clerk, } Appellants.
and *Anne* his Wife, on behalf of
their Son and Daughter, *John*
and *Anne Sagittary*, Infants, }

Sir *John Moleſworth*, Knight and
Bart. *John Arscott*, Esq; Execu-
tors of *Thomas Darrell*, Esq; and
Frances Arscott, Wife of said
John, and the Lady *Gratiana*
Carew, } Respondents.

THE appellants shewed, that *Thomas Darrell*, 4th Case 33.

August, 1697, made his will; and after specifick legacies to his five daughters, and to all his grand children, great grand children, and other relations, amounting to 4293*l.* disposed of the surplus of his personal estate, about 6000*l.* in the words following:—"Item, "all the rest of my estate, after my debts, legacies, "and funeral charges are paid, I give and bequeath the "same, to be equally divided between my three daughters, Mrs. *Frances Arscott*, the Lady *Gratiana Carew*, "and *Anne Risden*, and all my grand children, and "great grand children, or so many of them as shall be "living within two years next after my decease." And appointed respondents, Sir *John Moleſworth*, and Mr. *Arscott*, executors, and died 3d *January*, 1697; and that appellants, Mrs. *Trelawney*, and Mrs. *Sagittary*, were two of testator's grand daughters, and had after his death, and within two years thereof, three children, *Elizabeth Trelawney*, and *John* and *Anne Sagittary*, born of their bodies, and for them claimed shares of the surplus of testator's personal estate, as three of the great grand children, living within two years next after his death; and accordingly brought their bill in Chancery against respondents, the executors; and 1st *March*, 1698, the cause was heard before the Master of the Rolls, who declared that testator's grand children, and great grand children, born before the expiration of two years after

1701.

after his death, were intitled to their shares of his surplus, personal estate, equally with those born at the time of his death. But respondent, Lady *Gratiana Carrow*, being dissatisfied, petitioned to re-hear the cause; which was accordingly re-heard, 28th *June*, 1700, before the Lord Keeper; who declared that the infants, *Elizabeth*, *John* and *Ann*, born after the testator's death, were excluded from any share of the surplus, and decreed the same accordingly; but appellants contended that they were intitled equally with the testator's great grand children, living at the time of his death; they being in judgment of law of the same degree of relation to the testator; and that they were within the express words and meaning of the testator's will; and that therefore the latter decree ought to be reversed, and the former affirmed by the Lords.

Richard
Buckby.

The respondents, on the other hand, contended that the Lord Keeper's decree ought to be affirmed, and shewed that the testator's personal estate; was about 12,000*l.* and that he had living at his death five children; twelve grand children, and four great grand children, and by his will declared he thought it a duty incumbent on him to make some provision for all such children and grand children as he should leave behind him, and gave a particular legacy to each of his children, grand children, and great grand children by name, and then added the clause set forth in the appellant's case: And that this will was all dictated by the testator himself, and written by one *William Haken* (his clerk) in the presence of *Richard Fillis*, who stood by, which *Richard Fillis*, before publication of the said will, mentioned to the testator that he had forgotten one of his great-grand children, and the testator asking which, *Fillis* replied, the child in Madam *Darrell's* womb; meaning Madam *Darrell*, the wife of his grandson, *Henry Darrell*, who was then big with child. To which the testator answered, "he thought he had done very well for them already; you must not think I will give to them who are unborn:" And that this declaration was proved by *Fillis* and *Hocken*, who were both subscribing witnesses to the will;—and that the child that Madam *Darrell* went with, was afterwards-born, and died. And that the cause had been heard before the Master of the Rolls, upon bill and answer only; and that his honour was mistaken in his decrees,

decree, because, as respondents contended, the two years after testator's decease was allowed as a reasonable time to get in, and make a distribution of the estate amongst the legatees, and was not inserted or mentioned in the will, with regard to any grand children or great grand children to be born within those two years; and that respondent conceiving such construction of the will disagreeable to the testator's intention, appearing upon the will itself, and also contrary to his express declarations aforementioned, appealed to the Lord Keeper: And that afterwards, by an order made, 8th February, 1699, on hearing council on both sides, the order for rehearing was discharged, and the cause laid open, and plaintiffs to reply to defendants answer, and a commission to issue for examination of witnesses, in which commission the defendants joined, and witnesses were examined accordingly: And that the cause was heard before the Lord Keeper, on pleadings and proofs, and such decree made as stated by appellants; which last decree respondents insisted was conformable to the rules of law and equity, and to the intent of the testator in respect of the words of his will, and his expressions at the time of making it.

Die Veneris, 28^o Martii, 1701. After hearing Eq. Ab. council upon this appeal, it was ORDERED that the same should be dismissed, and the decree complained of affirmed. *Lords Journ.* vol. xvi. p. 636.

402.

John

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1701.
}

John Tidcombe, Esq. - - - Appellant.

John Cholmley, James Boddington, } Respondents,
& al.

Case 34.

THE appellant stated that he was Colonel of a regiment of foot, and that, in *February*, 169 $\frac{1}{2}$, his regiment being in debt for former cloathing, and wanting to be new clothed, respondent, *James Moyer*, who was agent to the regiment, and fully acquainted with its circumstances, applied to appellant to be employed to new cloath the regiment for the year 1696; and that appellant and *Moyer* agreed that appellant should execute a contract to respondent, *Cholmley* (whose name *Moyer* used in trust for himself) for the cloathing, and thereupon appellant was to make an assignment upon the army paymaster for the price of the cloathing, to be paid out of the * off-reckonings of the regiment as they should be in course payable, and then appellant was to be no farther liable by the contract: And that in consideration of debts then upon the off-reckonings for cloathing in a former year, and hazard and other inconveniences, and uncertainties of payment, the prices allowed for the cloathing were much higher than they would otherwise have been: And that accordingly, the 10th of *February*, 169 $\frac{1}{2}$, *Moyer* brought a contract in writing, as between appellant and respondent, *Cholmley*, to be executed by appellant, amounting, at the prices agreed upon, to 2331*l.* 12*s.* 6*d.* but appellant being unskilful in the forms, and fearing least upon the contract, as worded, he might be personally charged, in case *Moyer* should not be paid out of the off-reckonings, desired to advise with counsel thereupon; but *Moyer* replied, it was but to throw away a fee, for that appellant was not, nor should he be personally liable; and that appellant executed the contract under that confidence, and soon after made an assignment to *Cholmley* upon Lord *Ranelagh*, the army paymaster, for payment of the said sum of

* Note. The offreckonings is 2*d.* *per diem* off every soldier's pay, which is stop't in the paymaster's office towards the cloathing of the regiment.

2331*l.*

233*l.* 12*s.* 6*d.* out of the off-reckonings, which was duly entered in the paymaster's books, and *Meyer* accepted the same in discharge of the contract on appellant's part, and thereupon the appellant, considered himself discharged; and that 43*ol.* 7*s.* 4*d.* had been received by respondent, *Boddington*, pursuant to that assignment; and that other monies were ready to be paid when demanded; and that though *Meyer* solely contracted, and made the agreement with appellant, who knew not that any other person was concerned with him therein, yet it was pretended respondents, *James Boddington* and *Tracy Pouncefoot*, were to be partners with him in that contract, and also in the cloathing of Colonel *Brewer's*, Colonel *Lavender's*, and Sir *David Collier's* regiments, and that they cast lots, and appellant and Colonel *Brewer's* regiments fell to respondent *Boddington*, and the two other regiments to *Meyer* and *Pouncefoot*; and that the off-reckonings of the year 1695, being insufficient to pay for the cloathing of that year, and part of the off-reckonings of the succeeding year, 1696, being in such case (by the constant course of paying in the army, to be applied to make good such deficiency; and there being an act of parliament passed in the year 1697, whereby it was enacted, that the off-reckonings for the year, 1697, should be applied to pay the cloathing of that year, and *Boddington* being hereby disappointed, he, in *Cholmley's* name, brought an action at law against him upon the contract, to enforce him to pay the 233*l.* 12*s.* 6*d.* out of his own pocket; and that appellant had unavowedly pleaded, that the cloaths were not delivered at the time by the contract they ought to be; and therefore appellant, in *January*, 1699, exhibited his bill in Chancery for relief; and that respondent, *Boddington*, had in his answer confessed that the contract was made between appellant and *Meyer*, and that the appellant executed the assignment upon Lord *Relagb* for the 233*l.* 12*s.* 6*d.* to be paid out of the off-reckonings of the regiment; and that the meaning of the contract, and custom of the army, was, that the cloathing for 1696, was to be paid for out of the off-reckonings for that year; and in case they proved insufficient out of the off-reckonings for the next year, and that that assignment upon the off-reckonings was to be accepted in satisfaction of the cloathing, and appellant not to be answerable in his own right or person

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Will. 3^d.
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1701.

person, if appellant had not prevented him from the benefit of said assignment, which respondent alleged he had done; and that he *Boddington*, did know of the regiments having been in debt when the contract was made: And that witnesses were examined on both sides, and appellant had fully proved his case; and that *Boddington* knew of the regimental debts before the contract, and did not, neither could he make any proof that appellant had done any thing to prevent his having the benefit of the assignment; and that pending that suit, *Boddington* proceeded at law, and issue being joined upon the delivery of the said cloaths, obtained a verdict and judgment against appellant, and took him in execution thereupon; and that the cause was heard, 20th *February* last, before the Lord Keeper, who would not give appellant any relief, but left respondent *Cholmley* at liberty to proceed at law upon, but ordered that he should deduct the 43*ol.* 7*s.* 4*d.* received by *Boddington*; yet appellant insisted he was intitled to be relieved against that decree, because it was proved by the admission of *Moyer*, and likewise proved in the cause that, however the contract might be worded, it was expressly agreed that appellant should not be chargeable in his own person or right, and that he was hindered from advising with council by *Moyer's* assurances and promises, that he should not be personally liable; and because *Boddington* knew the reckonings of that year were charged with the cloathing of a former year; and because there were on that account great prices allowed for the cloaths; and because *Boddington* had admitted by his answer, that the assignment on Lord *Ranelagh* was to be accepted in full satisfaction, and appellant not to be liable of his own estate or person, unless he should, by some act of his, frustrate the same, and that there was no colour of proof of any such thing.

John
Hawles.
Henry
Pooley.

The respondents, on the other hand, shewed that *James Moyer*, being agent to several regiments, applied to respondent, *Boddington*, and *Tracy Pauncefort*, to cloath the four regiments, for the year 1696, and desired they would advance the money, and admit him to be concerned with them in the contracts: And that prices and particulars being agreed on, *Moyer* brought a contract for appellant's regiment, with and in the name of respondent, *Cholmley*, under the appellant's hand and seal,

feal, together with an assignment of the off-reckonings of his regiment also under appellant's hand and seal, in these words, written under the particulars of the goods :

—“ The above quantities of cloaths and accoutrements, amounting to the sum of 233*l.* 12*s.* 6*d.* I do approve of to be provided, and do hereby contract and agree for the same with *Jahn Cholmley*, of *London*, Merchant, which are to be delivered to me or my order “ in *London*, the 20th of *March* next.” And that, upon credit of this contract, and the others, the goods were accordingly delivered, most of them being bought and provided with *Boddington*'s money, and that therefore all the contracts were left with him; and that in some time after, *Boddington* went to the pay-master's office to receive the money on appellant's assignment, and found appellant had before assigned the off-reckonings for 1696, to one *Glover*, who had received them accordingly: and that appellant's regiment, for the year 1697, had been clothed by *Pauncefoot* and *Meyer*, who had all that year's off-reckonings paid them, except 43*ol.* 7*s.* 4*d.* which has been lately paid to the respondent, *Boddington*, in part of said contract: And that appellant's regiment had gone over into *Ireland*, in *April*, 1698, and was there; so that the assignment became of no benefit to respondent, for that appellant had the same power of his off-reckonings there as in *England*, and was bound to apply them to the cloathing in arrears, which was not in the power of any person but the colonel to effect: And that *Pauncefoot*, *Meyer* and *Boddington*, had afterwards artickled to divide their interest in the cloathing of the four regiments, and appellant's and colonel *Brewer*'s regiments had fallen to respondent, *Boddington*'s share, and respondent, *Cholmley*'s, name was used in trust for him only. And that appellant not paying, and respondent having no possible method to recover but against appellant, he, in *Michaelmas* Term, 1699, had appellant arrested in an action of debt upon the contract in *Cholmley*'s name, and in that vacation appellant brought a bill in Chancery, which the respondents answered; and appellant afterwards pleaded as shewed by him; and that appellant afterwards, in *March*, 1699, dismissed his bill in Chancery, and paid costs; and that the cause was afterwards, in *Trinity* term, 1700, tried upon an issue, joined upon the appellant's plea, by a special jury, and upon full evidence, a verdict found for respondent, *Cholmley*, agreeable to the opinion of the court,

1701.

court, for 233*l.* 12*s.* 6*d.* after which appellant brought another bill, and respondents put in similar answers as to the former; and witnesses were examined on both sides, and the cause was heard on the 11th and 20th *February*, 1700, before the Lord Keeper; who declared that the debt demanded by respondent, was just and honest, and that he saw no cause to relieve appellant, save as to the 43*0*l.** 4*s.* 4*d.* acknowledged to be received, which was ordered to be deducted, and gave respondents no costs in equity: And respondents contended, that as to the pretended evidence of a verbal agreement, qualifying the express contract in writing, as aforesaid, it would be of dangerous consequence to admit of any such against a contract reduced into writing, under hand and seal, which was meant to supersede all discourse, and to prevent perjury in proving such unwritten arguments; and the rather here, because *Moyer* was the appellant's agent when he made the contract, and brought it ready sealed to respondent: And that he having provided for his own money, and so become unconcerned in the cloathing in question, would swear to defeat the contract, wherein he ought not to be credited; because if the agreement was as alleged, the bringing a positive contract to respondent was a fraud upon respondent; and that such alleged defence was proper only at law, and he had there already solemnly tried it upon an issue of his own choosing: And that a contract was never known to be set aside in a court of equity, unless obtained by fraud, or circumvention, or without consideration, none of which were pretended in this case: And that the prices had been proved reasonable; and that the debt so recovered at law and in equity, was appellant's proper debt, and he was still in possession of his regiment, and had, or ought to have saved out of the off-reckonings to pay the arrears: And that respondents had no remedy save against appellant; and after being kept out of their money above five years, and forced to spend near 300*l.* to get it, respondent insisted that the decree ought to be affirmed with costs here, and in the Court of Chancery.

William
Atwood.

Pre. Ch.

143. &

Note, at

the close

of this

case there,

Die Martis, 15^o Aprilis, 1701. After hearing council upon this appeal, and on the answer of *James Boddington* and *John Cholmley* put in thereto, it was ORDERED and ADJUDGED that the said petition and appeal

appeal should be dismissed, and the decree complained of affirmed. *Lords Journ.* vol. xvi. p 653.

1701.

it is said that the Lords delayed giving judgment, that the parties might agree, and that they did so; and then the decree was confirmed by consent, and that the Lords seemed disposed to reverse it. And it appears by the journal that the cause was postponed, it being intimated that the parties were likely to agree; and that, on the 8th of April, it was ORDERED that the cause should be heard on the 15th of April, unless the parties intermediately agreed; and on the 15th judgment was given *ut supra*.

James

1701

James Tate and Mary, his Wife, Appellants.

Richard Lewis,

Respondent.

Case 35.

THE appellants stated, that *Lewis Morgan*, appellant *Mary*'s brother, was seised in fee of a real estate of 300*l.* a year, descended to him from his father, who died suddenly, and had made no manner of provision for appellant or her sisters, *Margaret* and *Elizabeth*, his three daughters; and that their mother having a jointure, and the inheritance of other lands, and being willing to get some provision for appellant, *Mary*, and her sisters, to be paid within a year after her death, delivered up part of her estate to the said *Lewis*, who thereupon entered into three bonds, dated 2d September, 1765; two of them in the penalty of 120*l.* each, for the payment of 60*l.* a-piece to the appellant, *Mary*, and her sister, *Elizabeth*; and the other of 140*l.* penalty, for payment of 80*l.* to *Margaret*; and that the mother dying in 1680, the bonds became payable in 1681; but that, their brother being a batchelor and very sickly, the sisters, who were his apparent heirs at law, were unwilling to disoblige him, and declined putting the bonds in suit; and that he fell into the hands of one *Edward Lewis*, attorney, and was by him imposed upon to make his will, and thereby gave his whole estate to respondent, an entire stranger, and made him sole executor; and that the will-maker took care to put in his own name for a legacy of 100*l.* and afterwards married his daughter to respondent, to the entire disrison of appellant, *Mary*, and her sisters; but by a codicil to his will, testator charged his lands with life annuities of 15*l.* a year a-piece, to appellant, *Mary*, and her sisters: Which devise, appellants contended, was never meant to be in satisfaction of the bonds; and that respondent refusing to pay appellant, *Mary*, her bond-money, appellants brought their action at law on the said bond, whereto respondent appeared, and pleaded conditions performed; and a trial was thereupon had, and upon full evidence a verdict for the appellants: And for relief against that verdict, and to have the other two bonds cancelled, respondent exhibited his bill in Chancery, suggesting, among other things, that he had pleaded an ill plea at law, which appellants insisted was never

yet

yet a ground for relief in equity: And that, 26th April, 1700, the Master of the Rolls, on hearing the cause, declared his opinion, that the annuities of 15*l.* given by testator's will, were in full satisfaction of the three bonds; and decreed the bonds to be delivered up and cancelled, and satisfaction to be acknowledged on record of appellants judgment at respondent's charge, and a perpetual injunction; and that the respondent had hastily, and by surprise, procured the decree to be signed and enrolled, to prevent a re-hearing, and for some consideration had procured releases from appellant's two sisters; but appellants insisted that the annuities were not given in satisfaction of the bonds, and that the will could not bear any such construction, nor was there any proof that testator so intended; and further insisted, that the respondent's bill could not warrant the decree; and that appellants having recovered a verdict at law on a full defence, ought to have the benefit thereof, and not be stripped of their whole debt, and costs at law, by the respondent, who had, without any consideration, thrust himself into a large inheritance which of right belonged to appellant, *Mary*, and her sisters, who had thereby been exposed to great want and necessities; and that therefore the decree ought to be reversed.

C. Core.

The respondent, in affirmance of the decree, shewed that he, in *Michaelmas* term, 1699, exhibited his bill, as stated by appellants, charging that the bonds were entered into by *Lewis Morgan* in his minority, and that appellants had sued him as executor to the said *Lewis Morgan*; and that by mistake, in pleading *scilicet ad diem*, instead of *deins age*, a verdict passed against the respondent: And that the testator was seised in fee of certain lands in *Brecon* and *Monmouth*, worth about 120*l.* yearly, and had contracted debts, by mortgage and otherwise, to the amount of above 1200*l.* and by his will in writing, dated *November*, 1696, devised to respondent, his near kinsman, his equity of redemption, and all his real estate whatsoever, and appointed him sole executor; and that no provision being made for the sisters, who had, by ill language and immodest behaviour, greatly disoblged the testator, respondent and his friends, at the sister's request, prevailed on the testator to permit his sisters to visit him on his death-bed; and afterwards, contrary to his inclination, prevailed on the testator, by a codicil to his will, to give his three sisters 15*l. per annum* a-piece, and in case any died, her annuity

annuity to be paid to the survivors: Shortly after which the testator died, and respondent proved the will, and paid in debts, legacies, and funeral expences, above 1200*l.* exclusive of the annuities paid and payable; and that the bonds were obtained by fraudulent practices, during testator's minority, and without consideration; and that during testator's life, being upwards of twenty-one years after the bonds were passed, the three sisters had never demanded them, nor any interest upon them, but entirely depended upon his courtesy, and upon such provision as he might make for them: And that the defendants in that cause having answered, witnesses were examined, and upon a full hearing, long debate, and due consideration, the court declared that the annuities were in full satisfaction of the bonds; and therefore decreed as stated by appellants: And the other sisters, and their husbands, were so well satisfied with the justice of the decree, that, in obedience thereto, they executed releases to respondent on the foot of their bonds: And that respondent, in some short time after the decree pronounced, procured it to be enrolled, and appellants, pretending irregularity in the inrolling thereof, petitioned the Lord Keeper for a re-hearing, which was refused; his lordship being well satisfied that the said decree was regularly inrolled: And respondent insisted that the decree ought not to be impeached, as the bonds were entered into by testator in his minority, without consideration, and no demand either of principal or interest made in his life-time, though he lived above twenty-one years after the bonds executed; and that the said three annuities, (supposing the bonds good) were more than an equivalent for the bonds: And further, that the three annuities, including 1200*l.* debts, legacies, and funeral expences, were near the full value of the estate given him by the testator; and that respondent had been harassed by the appellants in law and equity, and put to above 300*l.* charge, where the matter in dispute between them was only the said 600*l.* bond.

George
Clive.

Die Martis, 24^o Februarii, 1701. After hearing council upon this appeal, it was ORDERED, that the decree complained of be reversed; and that respondent, within one month, pay appellants their principal, interest, and costs at law and in equity, and on payment thereof to be relieved against the judgment; and in default of such payment, respondent's bill in Chancery to be dismissed with costs.—*Lords Journ.* vol. xvii. P 45.

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Jonatban Vaughan, and *Katherine*, } Appellant.
his Wife, - - -

Robert Tburston, Senior, - Respondent.

THE appellants by their petition stated, that in *Case 36.*
November, 1691, respondent, who was father
of *John*, appellant *Katherine's* former husband, for
his son's preferment in the world, gave him 100*l.* to
purchase an annuity of 20*l. per annum* from one *Stafford*,
for his life only, without any provision or advantage to
appellant, *Katherine*, then his wife; and that *John* died
within three months after, without having received any
benefit from the annuity, and much in debt; and ap-
pellant, *Katherine*, resolved not to intermeddle with his
effects, but was persuaded and prevailed on by respon-
dent to take administration to him, and that respondent
and his son, *Robert*, were present when appellant paid
her husband's debts, and advised and approved thereof;
and that respondent never demanded the 100*l.* during
her widowhood, which was six years; but that, as soon
as the appellant, *Jonatban*, and she had intermarried,
respondent commenced his action at law for the said 100*l.*
pretending it was only lent; and appellant, *Jonatban*,
being a stranger to the intrigues of the family, and in-
formed it had been given as a portion, and not secured
or acknowledged by any writing or memorandum as a
debt, and that respondent had possessed himself of good
part of his son's personal estate, preferred his bill in
Chancery for relief, and discovery of the assets of *John*,
which had come to his father's hands: And that respon-
dent, by his answer, insisted it was a subsisting debt,
and preferred his cross bill against the appellants for dis-
covery of assets: And that both causes came to be
heard, 7th *November, 1699*, before the late Lord
Chancellor *Somers*; who decreed an account before Sir
Robert Legard, one of the Masters, of what assets had
come to appellants hands; and that the Master reported
132*l. 2s. 4d.* assets in appellants hands: And shewed
that it appeared on the hearing, that respondent had
possessed himself of 15*l.* of his son's effects, though he
by answer had utterly denied it; and an issue at law was
directed to try whether he had such effects in his hands
or

1701. or not; but respondent, to avoid that issue, admitted the 15*l.* and offered to accept of it as part of the 100*l.* and was ordered to discount accordingly, whereby his debt was reduced to 85*l.* which the Master allowed him out of the 132*l.* 2*s.* 4*d.* after which there remained, according to the report in appellants hands, 47*l.* 2*s.* 4*d.* but that appellants took ten exceptions to the report; on arguing which before Sir *Nathan Wright*, Lord Keeper, 5th *July*, 1700. his lordship over-ruled some, and ordered a commission to examine witnesses as to others, whereby appellants clearly discharged themselves of 47*l.* and at the same commission, though the examination was confined to the matter of two exceptions, yet the appellants having no other opportunity to discharge themselves, exceeded the limits of the order, and, by positive proof, purged themselves of 35*l.* more, and were able, by particular proof, to have balanced the account; but the depositions to that point were over-ruled by the Court, as exceeding the limits of the order, and appellants paid 7*l.* costs in that respect; and, 26th *July*, 1701, the cause was finally heard before the Lord Keeper; who decreed appellants to pay to respondent 85*l.* out of 85*l.* 2*s.* 4*d.* assets reported to remain in their hands; which decree appellants insisted was erroneous and severe; because appellants were denied a trial at law, or a further commission to make proof of the other eight exceptions; and because appellants depositions, which were suppressed, would shew that appellants had in truth paid more than the assets amounted to; and because, notwithstanding that by the report there remained but 2*s.* 4*d.* assets in appellants hands, after paying the 85*l.* the Lord Keeper, by a subsequent order of the 13th of *November* last past, ordered appellants to pay respondent his costs, which are taxed at 224*l.* 17*s.* 4*d.* to the utter ruin of appellants; and insisted that awarding costs against an executrix was unprecedented, and that appellants ought rather to have their costs in their own cause, as they had been relieved in part, and had falsified the respondent's answer, and would have discharged themselves of all assets, had they been allowed to examine to those items of the report they had excepted against.

Robert
Price.

The respondent, in support of the decree, stated, that the appellant, *Catherine*, and appellant, *Vaughan*, her second husband, joined together to defraud all the creditors of *John Thurston*, her former husband, who

owed among and appraised to discovery, and both an account to state which received other served pellantified all avoid out of ten several count, over-ruled two execut and the straggles, Lord I ception, firm sufficient lant's both si costs o made order sides; costs, he wo debt; ; *therine* testator three v custod secretl

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owed respondent 100*l.* money lent; and that respondent, among others, brought his action at law for the 100*l.* and appellants exhibited their bill in Chancery, and obtained an injunction, which respondent not being able to dissolve, exhibited his bill against appellants, for discovery of assets; and appellants, by their answer, denied their having any assets at all; and that on hearing both causes, Lord *Somers* gave a general direction for an account of the assets; and the Master was directed to state a matter specially, touching a demand of 15*l.* which respondent, as alleged, acknowledged he had received of one *Cook*, in part of his debt; and as to all other demands the bill was dismissed, and costs were reserved till the account taken, and in that direction appellants appeared to acquiesce; and that the Master certified assets sufficient to satisfy respondents debt, after all allowances, and likewise certified that respondent, to avoid further litigation, had agreed to discount the 15*l.* out of the debt. But to this report the appellants took ten several exceptions, to about fifty items of the account, eight of which exceptions were on the hearing over-ruled; and it was sent back to the Master, as to two exceptions only on peril of costs; but that appellants could not prevail there, though two commissions executed, and several witnesses examined on both sides; and that on another report made, appellants procured a strange council to sign a petition for re-hearing the exceptions, the council in the cause having refused it, and the Lord Keeper indulged appellants therein; and the exceptions were re-heard, and the former order was confirmed, and the decree signed and enrolled; and assets sufficient to pay respondent's debt, appearing in appellant's hands, the Lord Keeper, on hearing council on both sides, ordered that appellants should pay respondent costs of both suits, to be taxed by Sir *Robert Legard*; but made no order for any examination touching the 15*l.* which order was again confirmed on hearing council on both sides; and respondent insisted he was well intitled to his costs, assets having been denied and proved, otherwise he would lose above 200*l.* by recovering his just debt; and the rather, as the answer of the appellant, *Catherine*, was utterly falsified, she having sworn that her testator kept no book, and it having been proved by three witnesses that she kept the very book in her own custody, and that; as soon as her husband was dead, she secretly removed away by night the best of his household goods,

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goods, and they could never be heard of, and took all his ready money, and put it out at interest in her own name, and enjoined the obligors with secrecy till after the inventory was taken, and that they had thereby, and by very vexatious litigation, defrauded the creditors, having brought a writ of error in the King's Bench to reverse a judgment for three shillings, obtained by a creditor in an inferior Court: And that respondent was eighty-five years old, and had been several years harassed in these suits for a small debt; and that this was a very unusual appeal, there being no complaint of the order on hearing, but of a subsequent order made on a re-hearing of exceptions, and the complaint general without assigning any particular error.

C. Coxe.

Die Mercurii, 25^o Februarii, 1701. After hearing counsel upon this appeal, it was ORDERED that the same should be dismissed, and the decree, order, and proceedings complained of, affirmed; and that appellant should pay respondent twenty pounds for his costs.
——*Lords Journ.* vol. xvii. p 46.

Testat

Josiah Twwaites, (the son of *James*,
 who was the son of *William*
Twwaites) by *Dorothy Twwaites* } Appellant.
 his Mother and Guardian, -

John Deye, and *Frances*, his wife, Respondents.

Case 37.

Die Mercurii, 24^o *Februarii*, 1701.

THE Lords ORDERED this cause to be heard *Lords*
 on *Wednesday* the 4th of *March* next, and that *Journ.*
Dame Susanna Bridgeman might be heard by her coun- *xvii. p. 45.*
 cil at the same time, if they should think fit: And

thereupon the Lady *Bridgeman* preferred a petition to *ib. 24.*
 the Lords, and shewed that the question in this cause

was, whether a settlement made by old Captain
Twwaites, appellant's grandfather, 12th *December*, 1678,
 had been rased or altered after it was executed? If
 it had been so rased or altered, the case would be with
 respondents: and that it was found by two verdicts
 at law, that the deed was rased and altered after exe-
 cution; for that after a hearing in the Exchequer,
 when matters were fresh in memory, and the witnesses
 living, upon a solemn trial at bar, 15th *June*, 1683,
 the jury found the deed rased and altered after execution,
 and a decree in the Exchequer was then made accord-
 ingly; after which the matter rested in quiet many
 years; and respondent, *Deye*, wanting money, the
 Lady *Bridgeman* (being advised by council that, after
 such a trial and decree, the title was good) lent *Deye*
 2000*l.* upon a mortgage of the estate, which, with
 many years interest, was still due to her: And that
 in *December*, 1619, an appeal was brought from this
 decree. And upon hearing the cause, 25th *April*,
 1690, the Lords were pleased to open the decree so
 far, as to give liberty to try the cause again, but ap-
 pellant resting quiet for eight years, and not pro-
 ceeding therein, the Lady *Bridgeman*, who was now
 forced to follow and look after the cause, in *April*, *Lords*
 1698, applied to discharge the order for another *Journ.*
 trial; and the Lords thereupon, 23d *May*, 1698, *xvi. p.*
 ordered that the intended new trial should be had with- *26o.*
 in a year then next; but that not being done, Lady *ib. 294.*
Bridgeman, 23d *March*, 1699, again applied to the *ib. 558.*
 Lords,

1701. Lords, who ordered that the trial should be had before the end of *Michaelmas* term then next; and that a trial was had in *Trinity* Term, 1700, and (by surprise, and against the weight of the evidence, as she was advised) a verdict was found contrary to the former verdict; and that thereupon the Lady *Bridgeman* applied to the Lords for liberty to try it again, her debt being equal to the value of the estate; and *Deye*, the mortgagor, being insolvent, and that the Lords directed a new trial upon payment of costs, and that the Lady *Bridgeman* might defend in the name of *Deye*, and she had accordingly paid 52*l.* costs: And, 19th *November*, 1701, a very solemn trial was had by a special jury of gentlemen of the best quality in *Middlesex*, at the bar of the *Exchequer*, which lasted almost two days and a night, and a verdict found agreeable with the first trial, that the deed was rased and altered after the execution thereof. Lady *Bridgeman*, by her petition, therefore prayed, that the appeal might be dismissed, and the decree made in the *Exchequer* affirmed; and that she might have the costs of these proceedings, and of the last trial, she having been at the charges thereof.

Sam.
Dodd.

And the respondents on their part made this case: That the single question was, whether respondents *Frances's*, name had been rased out, and her brother, *James*, appellants father's name inserted instead thereof, in a deed of settlement made by *William*, her father, upon her, said *Frances*, and her younger brother, *Thomas*, before or after the execution of the same deed? the words rased out being "*Frances*, daughter," and the words inserted, "*James*, eldest son," and that respondents discovering that the rasure was made after the deed sealed, and not having the custody of the deed, in *Trinity* Term, 1682, exhibited their bill in the Court of *Exchequer* against said *James Thwaites* and *Street*, and *Healb*, his guardians, who kept and concealed the deed, and refused to produce it, to discover the settlement, rasure, and alteration, and to be relieved: And that the cause was regularly heard, and a trial at bar directed, and had, by a special jury of gentlemen; whether the rasure was made after the deed executed? and a verdict, that the rasure was made after sealing the deed; and a decree made thereon: And that *Jonathan Bali*, one of said *James's* witnesses,

was

was convicted of perjury, and stood in the pillory for the evidence he gave in the trial: And that respondents being in quiet possession of the premises under the said verdict and decree, mortgaged same to Lady *Bridgeman* for 2000*l.* and that the deed had been left with a Mrs. *Welch*, by *William*, and Mrs. *Lymbrey* had fetched it away about a week after, as the pretended, by *William's* order, and consequently the same could not, as was alleged, be with *Heath* the day it was sealed; and the probability was, *Lymbrey* and *Street*, who were *James's* partizans, might, after they had made the rasure, have delivered it folded up to *Heath* who might have then delivered it without knowing of the rasure: And that Lady *Bridgeman's* trustees had taken upon them the management of this cause before the Lords, ever since the order of the 25th *April*, 1690, hitherto, and consented in respondents name, unknown to them, to an order that appellant should have the benefit of *William Thwaites's* will; and that Lady *Bridgman*, also would have the management of the second trial, and not suffer respondents to interfere, nor let them see their briefs, because their Interest was the greatest, and that they had in several instances mismanaged the cause; that by which means only appellant, on the second trial, obtained a verdict; and that respondents had, on the third trial, after the jury spent above twenty-seven hours in consideration of all the evidence, fairly obtained a verdict according to the first verdict, namely, that the deed was rased after it was sealed; respondent therefore insisted, that the decree on the last verdict ought to be affirmed by the Lords,

Richard
Godfrey.

Die Lune, 9^o *March*, 1701. After hearing council on this appeal (which was brought in 5th *December*, 1689, from a decree of the Court of *Exchequer*, made the 18th of *June*, 1683), it was ORDERED and ADJUDGED, that the said decree be affirmed, with this alteration; that appellant, *Josiah Thwaites*, and all legally intituled under him, should have the benefit of the deed of appointment. *Lords Journ.* vol. xvii. p 65.

✶ The appellant's case is wanting in this report.

* See a case of this name, reported 2 Vern. 80. Eq. Ab. 243. pl. 6. Vin. xxvi. 479. but the circumstances, as here stated, do not appear in any of these books.

Thomas

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1701.
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Thomas Dent, D. D.

Appellant.

Sir William Buck, Knight and Bart. } Respondents,
and others, - - -

Case 38.

THE appellant made this case: That he was vicar of *Lenton*, in the county of *Lincoln*, and that the manor or lordship of *Handby*, alias *Hanbeck*, and also certain lands called *Grangeleas*, both the estate of respondent, were situate in his parish; and that it was sometimes pretended *Handby* was exempt wholly from tythes; and at other times, that a *modus* of twenty shillings *per annum*, was payable in lieu of all tythes for that manor: But appellant stated, that a suit had been commenced in the *Archb.* 37th *Eliz.* by the then vicar, against the owner, or farmer of the lordship of *Handby*, and nine witnesses examined, who proved the payment of tythes for that estate; but that defendant, in the *Spiritual* Court, upon suggestion of such a *modus* of twenty shillings, obtained a prohibition, and examined two witnesses to prove his suggestion, and that issue was joined thereon, and a trial at *Lincoln*, and the jury found against the *modus*, and a consultation awarded, and that, 39th *Eliz.* a sentence was given for the tythes in the *Spiritual* Court; but that respondent's grandfather, or father, afterwards, in 12^o *Jac. I.* with design to impose on the succeeding vicars, took out an exemplification of the suggestion and prohibition, and the testimony of the two witnesses examined to prove the suggestion, but omitted the trial at law, and judgment in the *King's Bench*, consultation and sentence in the *Ecclesiastical* Court, and that some succeeding vicars were prevailed upon to take sometimes twenty nobles *per annum*, and sometimes a certain clofe was allotted in lieu of tythes, and sometimes 13*l.* *per annum* paid, as appeared by two terriers taken out of the register of *Lincoln*; and that in Mr. *Lodington's*, appellant's predecessor's time 1*l.* yearly was paid, besides the pretended *modus* of twenty shillings; but that the vicars had, from time to time, been prevailed on to give acquittances in full, expressing only twenty shillings *modus*, though they were constantly paid the other sums besides: And that when appellant was appointed vicar, he applied to respondent

respondent for the tythes; but respondent produced the exemplification, and pretended that there never had been further proceedings therein, but that the succeeding vicars, convinced of the truth of such *modus*, had acquiesced under it, which appellat crediting, without farther examination (for peace sake) submitted to an agreement, which, though written by himself, was drawn up in particulars by a Mr. *Peregrine Buck*, respondent's relation, and who had been his guardian, and who probably was privy to the fraud against the former vicars, he being a subscribing witness to several acquittances produced for the pretended *modus*, and who principally promoted that agreement, and seduced appellat to write it; and thereby appellat covenanted to accept the same money as was paid to his predecessors, and to give such discharges as they had done; but that, by some copies of writings since accidentally fallen into his hands, appellat had discovered the fraud of the exemplification, and that respondent had imposed upon him, and therefore had preferred his bill against respondent for tythes in kind, and to be relieved against that agreement as fraudulent; which imported that respondent had shewed to appellat an exemplification of a record, testifying an ancient right, or *modus*, by prescription of twenty shillings *per annum*, formerly paid by his ancestors to the vicars of *Lenton*, in full consideration of all tythes whatsoever, and that it was therefore thereupon fully agreed on between the above named persons, &c. and appellat stated that he would never have questioned the agreement, if the exemplification, so produced by respondent, had contained, as respondent averred, the whole matter of the record; but that this appearing otherwise, and respondent intending to circumvent him not only of the tythes of *Handby*, but also to include *Grangeleas* under the same agreement, though appellat had fully proved in the cause that *Grangeleas* lay in another lordship, and always paid parish rates as part of *Lenton*; and shewed further, that the *modus* pretended, was only for 200 acres of meadow, and 200 acres of pasture, and that the lordship of *Handby* alone contained full 800 acres, and was worth near 500*l.* *per annum* rent, of which the vicars should have the rectorial tythes; for that it appeared by the record, in the valuation of the first fruits, proved in the cause, that it was one of the endowments of the vicarage; and shewed also, that there were depositions of nine

1701.

nine witnesses taken (*in perpetuum rei memoriam*) by a commission directed out of Chancery in vicar Dale's time, who proved the several kinds of tythes paid to the former vicars, viz. corn, hay, wool, &c. and that though acquittances for the *modus* of twenty shillings *per annum*, were pretended to have been given by the vicars near fifty years, yet none were proved to be given by vicar Dale or *Tempest Wood*, his successor; though one lived vicar near twenty years, and the other fourteen; and that during all the time acquittances were so supposed to be given, the owners of *Handby* paid sometimes 13*l.* yearly; and 11*l.* *per annum* was paid to Mr. *Loddington*, appellant's immediate predecessor; and so appeared by the tythe book proved in the cause: But that, notwithstanding all this, the Court of *Exchequer*, on the hearing, dismissed appellant's bill, and would not relieve him against the agreement, nor decree him tythes in kind of *Hanbeck*, nor even decree him the money payable under that agreement, though six years were due, of 11*l.* *per. annum*, and also refused him relief as to the tythes of *Grangeleas*, though he had proved it to be no part of *Handby*, and decreed costs against him, in prejudice to the church and the appellant's right.

Samuel
Dodd.

The respondents on the other hand stated, that the true questions between them were; 1st, whether appellants agreement, under his hand and seal, drawn and engrossed by himself, to accept of twenty shillings a year for all tythes according to an ancient *modus*, should bind him or not? And 2d, whether a close, called *Grangeleas*, were part of *Handbygrange*, or part of the manor of *Lenton*? To elucidate which, respondent made this case: That appellant was instituted vicar of *Lenton*, in 1687, and that respondent was seised in fee of the manor or *Grange* called *Handbeck*, alias *Handbygrange* in that parish, and that the abbot, of *Vaudie* of the *Cistercians* order, before the dissolution, was proprietor of the *Grange*, as parcel of the possessions of the *Abbey* and that respondent, Sir *William Buck*, by his answer to appellant's bill, prescribed to be discharged of tythes of the said *Grange* by payment of twenty shillings a year, and that his proofs were receipts and acquittances of the respective vicars for above eighty-seven years last and that controversies growing, appellant proposed a meeting to accommodate matters; and respondent shewed appellant and

and his agents all his writings and evidences relating to the said modus, and amongst others an exemplification of a record in prohibition in the *Queen's Bench*, *Michælmas*, 37th and 38th of *Eliz.* which proved the *modus*; and that appellant and respondent, 4th *December*, 1690, came to an agreement, which was drawn and engrossed by appellant's own hand, reciting the said difference, and the bill and answer, and the exemplification; and that in order to put a stop to all further proceedings, it was agreed appellant should, as all his predecessors had done, give respondent and his heirs the same receipts for twenty shillings; and respondent thereby agreed to pay the appellant 10*l.* a year, as a voluntary offering, or free gift, every year at *Easter*, during the time he was vicar of *Lenton*, besides the twenty shillings a year; and thereby appellant agreed not to molest or disturb the respondent, or his heirs, by any further suit, process, or action, for any tythes whatsoever, respondent paying for the years last past according to that agreement; and that respondent had paid accordingly, notwithstanding which appellant, in *Michaelmas*, 1699, exhibited another bill against respondent, and twelve of his tenants, on pretence of injury to the church and him by that agreement; and that respondent, by his answer, insisted on the *modus*, and on appellant's agreement; and that *Grangeleas* was part of *Handby demesne*, and no part of the manor of *Lavington*, and that on the hearing appellant's bill was dismissed as to the tythes of *Handby Grange*, and an issue at law was directed, whether *Grangeleas* were part of *Handby Grange* or not? And that appellant had petitioned for a rehearing; and the cause was accordingly reheard, when the court declared that, as to the tythes of *Handby Grange*, appellant was not relievable against his own agreement, and that they adhered to their former judgment; and appellant, who was then present in Court, and refusing to go to trial, on the issue directed, and wholly waving the same, it was ORDERED that his bill should be absolutely dismissed with costs; but, without prejudice to the appellant's demands of 10*l. per annum* payable to him, according to the said agreement; and respondent insisted the decree of dismissal ought to be affirmed, as this ^{John} cause had received a hearing and re-hearing, and ^{Hawles} appellant fought relief against an ancient modus, and his own agreement, and had waved the issue directed.

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1701. *Die Jovis, 19^o Martii, 1701.* After hearing council upon this appeal, it was ORDERED that the dissolution or decree made in the Court of Exchequer, and the affirmation thereof, should be reversed; and the agreement complained of set aside: And, (*Die Veneris, 27^o Martii, 1702*) that the Court of Exchequer should proceed to hear and determine the cause, as to the right of the tithes in question, notwithstanding the agreement. *Lords Journ.* vol. xvii. p. 76. 84.

in the case of *Broderick, v. Broderick*, v. *ib.* 534.

Note. The cause having come on accordingly to be heard in the Court of Exchequer, the Barons directed two issues at law; one to try the validity of the *modus*, and the other to try whether *Grangeleas* were parcel of *Handby Grange* or not? And from this last decree, the former appellant again appealed to the Lords; and by his petition shewed, that on the late hearing before the Barons, 6th July, 1702, his council had insisted on a decree for the tithes, for the time demanded by his bill; but that the Barons had directed issues as aforesaid, which he insisted was erroneous; because the *modus* alleged was endeavoured to be maintained by great fraud and undue practices, in prejudice of the church, and contrary to a trial already had at law, and because this was a matter proper for relief in equity; and because the pretended *modus* was contradicted by respondents own proofs, he and his ancestors having paid above 10*l.* a year for near fifty years past, which and the agreement for 11*l.* pound a year (already annulled by the Lords) were inconsistent with the supposed *modus*; and because there was sufficient proof that *Grangeleas* was not part of *Handby Grange*; and that to send appellant to a trial in the country, would be to hazard the rights of the church, and to put him in worse condition than he was before the lords relieved him by reversing the former decree.

Samuel
Dodd.

The respondent on the other hand shewed, that on the last hearing in the Exchequer, appellant produced two terriers, which he would have read on the first hearing and re-hearing, on the deposition of *Thomas Peachel*, who had been examined after publication passed in the cause, both alleged to be had out of the registry of *Lincoln*, one dated 1577, the other 1634, of which respondent had no notice till the day before the first hearing, and also a pretended tithe book of Mr.

Lodginger

Loddington, a former vicar, not produced till the rehearing, with several leaves torn out, and new ones added, and interlineations in appellant's hand writing, and not proved in the cause till 16th *June*, last; none of which were allowed in evidence, either before the Lords or on the last hearing: Wherefore the Barons directed the issues stated by appellant; which direction respondent insisted was just, and well founded, such matters being properly triable at law by a jury of the country, upon evidence given *viva voce*, and not by depositions in equity.

Die Sabbati, 20^o Februarii, 1702. After hearing council, it was ADJUDGED by the Lords, that the petition and appeal of *Thomas Dent*, D. D. should be dismissed, and the decretal order therein complained of be affirmed. *Lords Journ.* vol. xvii. p. 293.

Sir

1701.

Sir Basil Firebrace, Knt. and Bart. Appellant.

Arthur Moore, Esquire, Respondent.

Case 39.

THE appellant stated, that the old East India Company, in *Michaelmas* term, 1695, brought a bill in Chancery against Sir *Thomas Cooke*, for an account, of above 100,000*l.* in stock and money, and made appellant a party, and charged him with a very considerable sum of money, though that money had been paid by the company to other persons, and appellant no ways accountable for it; and that that suit had depended several years, and was vexatious and chargeable to appellant, and the occasion of great dissentions amongst the adventurers, and kept the stock low; and that therefore several adventurers often proposed an accommodation, and at length, at a general court summoned for the purpose, after full debate, an order was made, 6th *July*, 1699, that the matters in difference should be referred to respondent. amongst other adventurers, over whom respondent then had great influence and interest: And that appellant, at respondent's instance, furnished him with divers orders, and warrants of the company, for issuing out the money so charged against respondent, and which would have shewed him no ways accountable for it, the better to enable respondent to open the case fairly to the general court, and court of committees, whereof he was one; and that respondent had declared, in the general court and otherwise, that the demand, as to appellant, was groundless and ought to be released: And that respondent, some few days after he had so become a referee, sent *James Craggs*, Esq. to propose to appellant, to let him have 6000*l.* stock in the company, at the then market price, with liberty to pay for it at any time within a year, without interest; and that appellant at first refused, as being an advantage respondent ought not to expect; but that having just cause to suspect, that the meeting of the referees, was from time to time put off by respondent's contrivance, and that thereby the suit might be prolonged, to appellant's great charge and vexation, appellant was at last prevailed on by *Craggs* to sign a contract, which he brought ready drawn, dated

ed 19th July, 1699, in his own name, but in trust for respondent, viz. reciting that appellant had at *Craggs'* request, advanced 2520*l.* for the purchase of 6000*l.* stock; and it was thereby agreed that the 6000*l.* stock, should continue in appellant's name, till *Craggs* should pay 2520*l.* being at the rate of 42*l.* per cent. the then ready money price of stock, which *Craggs* covenanted to do, on or before the 19th July, 1700; and in default thereof, that appellant might sell the stock, and that if it fell short *Craggs* would make it up; and if sold for more, appellant to pay the overplus to *Craggs*, with a covenant from appellant, that in case *Craggs* so paid the 2520*l.* appellant should transfer the stock; and appellant stated, that the contract was signed and delivered to *Craggs* upon express condition, that in case the company did not within a month dismiss their bill, and execute a general release to appellant, the contract should be void, and re-delivered to appellant, of which condition *Craggs* acquainted respondent, and he consented thereto; and that the company not dismissing their bill, or executing a release within a month, *Craggs* came again to appellant to have the time enlarged, which was agreed to for a fortnight only, but not being complied with in that time, the agreement was void; besides which, appellant stated, that there was no consideration or agreement for any allowance in lieu of interest, for non-payment of the money for a year, nor any recompence for the advantage respondent was to have, in being at liberty to call for the stock at any time within the year, though such benefit was worth above 10*l.* per cent: And that *Craggs*, by indorsement upon the contract, dated 15th November, 1699, assigned the benefit thereof to respondent, without obliging him to the payment of the 2520*l.* or any part thereof, and fraudulently procured appellant himself, to be a witness to the assignment: And that, in *Michaelsmas*, 1700, respondent brought his bill in Chancery, to have a performance of this contract in specie; and 31st January last, the cause came to be heard before the Lord Keeper, who decreed appellant to transfer to respondent 6000*l.* stock, and to allow respondent a dividend of ten per cent. made upon the East India stock since the contract, amounting to 600*l.* and that respondent should pay appellant the residue of the purchase money, with interest from the 19th July, 1700, which by the order was computed at 210*l.* 9*s.* 6*d.* and appellant to pay respondent his costs which decree; appellant insisted

1701.

1701. { filed was unjust, as thereby respondent, without laying out a farthing of money, would get 3000*l.* and because the contract hereby confirmed, was in the nature only of a stock-jobbing bargain, and contrary to the intent of the statute in that behalf, and would have been within the letter of that statute, were it not for the recital in the contract; that appellant, at the request of *Craggs*, had advanced the 2520*l.* which was entirely fictitious, and that by such means the act against stock-jobbing might be entirely eluded; and because the contract was obtained by contrivance and circumvention, without consideration paid by respondent, and whilst he was a referee, and able to do appellant great prejudice, unless he complied with his unfair and unreasonable demand, and therefore ought not to be countenanced in a court of equity; because, if it were fair, respondent might, in *Craggs* name, sue at law and recover damages, and if not, it ought not to be established in a court of conscience.

J. Hawies.
J. Jekyll.

The respondent's case is wanting; but may be reasonably collected from appellant's observations. Appellant observes, that the goodness of the decree depended on the nature of the bargain, and the means by which it was obtained; and that all respondent's obligations, relative to appellant's solicitor's conduct with the witnesses, was foreign to the case, and no way in issue before the Lords; and that the indiscretion of appellant's solicitor, or his being advised to insist upon a mistaken defence, (it it were so,) ought not to be any argument, wherefrom to form a judgment of the merits of the case: And appellant took notice, that respondent averred in his case, that 1*l.* 10*s.* *per cent.* had been allowed by him above the market price of the stock, in consideration of the forbearance of the purchase-money for a year; but that the contrary had been proved by *Craggs*, the only person privy to the contract; viz. that the stock was agreed to be transferred at the then market price, 42*l.* *per cent.* and that there was no allowance whatever for the year's forbearance; so that the bargain was entirely without consideration: And though respondent, in his case averred that such contracts were the usual methods practised in buying stock for time, or forbearance of payment, yet he did not give any instance where an additional allowance was not made, above the ready money price current; neither did

respondent

respondent give any answer at all to the artifice where-
by he obtained this bargain: And appellants averred,
that upon consideration of all the circumstances, it
would appear, that the contract was not an absolute
bargain, but a corrupt contract on respondent's part,
obtained by undue practices, without any just considera-
tion, and that appellants being a witness to the assign-
ment, from *Creggs* to respondent, could not make it a
good one.

Die Jovis. 12^o Martii 1701. After hearing coun-
cil upon this appeal, it was adjudged by the Lords,
that the same should be dismissed, and the decretal or-
der therein complained of be affirmed. *Lords Journ.*
xvii. p. 69.

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Abjourn

1701.

Alisohn Stokes, Esq.

Appellant.

Richard Clarke, and Susannab his } Respondents
wife, and Philip Jenkins,

CASE 40. **T**HIS appeal was from a decree in Chancery, made 3d February, 1699, in a cause wherein *Rebecca Jenkins*, respondent, *Philip's* mother and respondent *Susanna*, then *Susanna Rainbutt*, widow, were plaintiffs, and *Cristopher Stokes* the elder, deceased, and others defendants; and thereby, amongst other things, a lease for three lives of the parsonage of *Witchurch*, and also the household stuff and goods in the parsonage house, were decreed to said *Philip* and *Susanna*, as heirs at law of *Mary Ayliffe*, widow: And appellant stated, that the master and brethren of *St. Cross*, nigh *Winchester*, 2d August, 35. Car. 2. had demised the parsonage of *Witchurch* to said *Mary Ayliffe* and her assigns for her own life, and the lives of *Jane Brookes* and *Thomas Brookes*, and the longest liver of them: And that said *Mary Ayliffe*, 15th August, 35. Car. 2. had previous to her marriage with said *Christopher Stokes* the elder, and with his consent assigned over that lease to trustees in trust, to permit her to receive the rents and profits during her life; and after her death to permit such child or children as she should leave at her death, and their heirs, equally share and share alike, to receive the rents, issues and profits, for the residue of the term and estate and if she died without children, then in trust, to permit the said *Thomas Brookes*, if then living, or if dead, such child or children of his as should be then living, to receive the rents and profits for the remainder of the term; and if he died in her lifetime, leaving no child, that then the trustees should dispose of the premises to such person or persons as at her decease should be her heir or heirs at law; And that said *Mary Ayliffe* did, by another deed of the same date, in like manner assign over to the same trustees all her household goods and plate, in or about the said parsonage house, in trust, to permit her to use them during her life; and after her death to deliver them over to the person or persons who immediately upon her death should be

be intitled to the trust of the dwelling house in *Whitchurch*; and that *Mary Ayliffe* died without issue, in *May*, 1690, *Jane Brookes* and *Thomas Brookes* having died before her without issue; and that the said lease being thereby totally determined, the master and brethren of *St. Cross* entered upon the premises, and, in *May*, 1691, demanded the said parsonage and tythes of *Whitchurch* to said *Christopher Stokes* the elder, for the lives of said *Christopher* the elder, *Christopher Stokes* the younger, and *Francis Stonehouse*, Esq. and, that said *Mr. Stokes* had paid a fine of 1800*l.* for that lease: And that, in *Easter* term following, said *Rebecca Jenkins* and *Susanna Rainbutt*, as heirs at law to said *Mary Ayliffe*, exhibited their bill in Chancery, to compel the said *Christopher Stokes* the elder to transfer to them his new lease for three lives, and to account for the profits from his wife's death, and to deliver the household goods; complaining that *Mr. Stokes* had obstructed his wife's renewing the old lease; and that *Mr. Stokes* had by his answer claimed the goods as administrator to his wife, and the new lease as a purchaser; and insisted that the old lease being determined, all the trusts relating to it were determined, and denied he ever obstructed his wife's repewing the old lease: And that, before the cause came to hearing, *Mr. Stokes* the elder died, and by his will gave the new lease to his son and heir, *Christopher Stokes* the younger, since dead, and that appellant was administrator and heir to the father and son: And appellant further stated, that *Rebecca Jenkins* likewise died, and respondent, *Philip Jenkins*, was her heir and executor; and that the said suit was revived; and on the hearing the late Lord Chancellor declared that *Mr. Stokes* the elder, being privy and party to his wife's said trust assignment, had excluded himself from all right of taking a new lease to his own benefit; and therefore decreed that the said *Christopher Stokes* the younger, should account for the rents and profits since the death of *Mary Ayliffe*, and should be allowed the fine paid for the new lease with interest, and should assign the new lease to the said *Susanna Rainbutt* and *Philip Jenkins*, free from all incumbrances induced by him or his father; which decree appellant contended ought to be reverted; because the old lease, and all the trusts concerning it, were determined by the death of the last *Cestuiquevie* named in that lease; and because

{ 1702. }

because there was no agreement or provision for filling up the lives, or renewing the old lease, which could not be an omission, or forgetfulness, because there was a church lease for twenty-one years of another estate settled at the same time, and that was expressly agreed to be renewed; and yet that lease for twenty-one years being expired, and a stranger having got a new lease, the Lord Chancellor thought fit to make no order about it; and also, because there was no such right as respondents pretended, of obtaining a new lease from a college or church by the tenant, or his representatives, after the expiration of the old lease; and that Chancery never allowed of such a pretended right between the church and her tenants; and further, because the heirs in this case neglected to treat with the hospital for a new lease for above eleven months, and Mr. *Stokes* the elder purchased the new lease as any stranger might have done; and finally, because the heirs acquiesced, and never sued Mr. *Stokes* the elder till after his purchasing the new lease, and he never kept any account of the profits, considering himself an absolute purchaser; and it was hardly possible for appellant to enter into any account of profits and outgoings during the time of Mr. *Stokes* the father, and afterwards of his son: And that as to the household goods, the limitation of them after the death of *Mary Ayliffe* seemed uncertain and void; and if respondents had no right to the new lease, they could have none to the goods: And appellant shewed, that Mr. *Stokes* the elder had mortgaged the new lease for nine hundred pounds, and that afterwards two of the lives died, and the new lease was surrendered by the mortgagee, and another lease taken in his name for three lives, for which another fine of 900*l.* was paid, and that second new lease remained vested in the mortgagee, as a security for 1800*l.* and that the mortgagee was no party to the decree; and that the mortgaged premises were not worth above 120*l.* *per annum*, though the improvements had cost the *Stokes's* above 1000*l.*

Wm. De-
bys.

The respondent on the other hand shewed, that by the second deed of the 15th *August*, 1683, respecting the household goods and plate, it was provided, that after the death of *Mary Ayliffe*, the trustees should deliver the goods (other than the plate) in the manner shewed

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shewed by appellant; and should deliver and dispose of the plate to such persons, and in such manner, as she, whether sole or covert, should, (by writing signed and sealed in the presence of two or more witnesses) appoint, and for want of such appointment, to her executors and administrators: And that, 30th July, 1684, *Mary*, then wife of *Christopher Stokes* the elder, by writing, under her hand and seal, executed in presence of three witnesses, purporting to be her last will, in pursuance of the said power, did give and appoint the said plate to *Rebecca Jenkins*, respondent *Susanna*, and the said *Jane Brookes*, whom she made executors of the said will, and desired that the plate should be sold by them to raise money towards putting in a life instead of *Thomas Brookes*, then deceased, into the rectory of *Whitchurch*, in case they wanted money to do it: And that *Jane Brooks* afterwards died in *Mary's* life-time; and that *Christopher Stokes* the elder received the profits of *Whitchurch* during his wife's life, and did not suffer the lease to be renewed while she lived; and that *Mary Stokes* died without issue, leaving *Rebecca Jenkins*, and respondent *Susanna*, her heirs at law; and the lease expiring by *Mary's* death, *Christopher Stokes* soon after renewed the lease, and possessed himself of the household goods and plate as shewed by appellant; and respondent contended that the decree was just, and ought to be affirmed, because *Mary's* estate for three lives in the rectory was a renewable interest, and that the tenant in possession had usually been preferred and allowed a right of renewal, and that therefore the benefit of such renewal ought to accrue to respondents according to the limitations, and manifest intent of the conveyance, made previous to the marriage: And respondents insisted, that the trust of the rectory did not expire on *Mary's* death, but continued and passed with the renewable interest to her heirs at law, and that by consequence they were intitled to the household goods on her death, being the persons pointed at by the trust of the said household goods; and the rather, because *Christopher* the father was privy and a party to such assignment; and moreover, the title of *Christopher* the father to the household goods was only as administrator to his wife, and that such title determined on his death; and it did not appear that the property of the goods was altered in his life-time, or divested out of the trustees; and

1702.

and appellant not having taken out administration, *de bonis non*, to *Mary Stokes*, had no manner of right to the goods; and respondents further insisted, that *Christopher Stokes* the father could only claim to be *cestuique* trust of the goods after his wife's death, as her administrator, which imported no more than a right to a chose in action, which could not be disposed of by his will; and that a husband was intitled to a wife's estate no otherwise than as before the statute of distributions.

Wm.

Cowper.

Die Jovis, 26^o Martii, 1702. After hearing council upon this petition and appeal, praying that so much of the decree as related to the sale of the parsonage "of *Whitchurch*, as also the household goods (other than "the plate) may be reversed," it was ADJUDGED by the Lords, that the decree complained of should be reversed, as to so much thereof as decreed *Christopher Stokes* the younger to account for the rents and profits of the rectory of *Whitchurch* in question, since the death of *Mary Ayliffe*, and to assign the said rectory and premisses to the respondents; and as to all other matters the decree was affirmed. *Lords Journ.* vol. xvi. p 83.



William

William Harris, Esq.

- - Appellant.

George Parker, Esq.

- - Respondent.

THE appellant shewed, that he was lord of the manor, and hundred of *Lytton*, in *Devon*, and claimed the goods of all felons within the same; and that, 2d *May*, 1693, *Wyke Parker*, respondent's brother, had murdered one *John Thomas*, and was indicted, tried, and convicted; and at the time of the felony, committal, and conviction, was possessed of a large personal estate, and particularly of two bonds or bills, wherein respondent stood bound to pay him 7940*l*. principal money; and that those bonds were within the appellant's manor and hundred of *Lytton* at the time of the felony committed, and forfeited by the conviction; and appellant stated the single question to be, Whether this forfeited estate of the felon belonged to appellant, as Lord of the manor and hundred, or to respondent, who claimed it under a grant from the crown, made (*pendente lite*) but could not produce a single instance from the reign of King *John*, that the King had seized, or had the goods of any felon within this manor or hundred; but that it appeared on the contrary, that appellant and his ancestors, had all along, during all that time, quietly, and without interruption, held and enjoyed all felons goods within the same; and tho' respondent should object that felons goods were no where granted to appellant, or his ancestors, in express words, and that they could not otherwise pass from the crown; and though in the Earl of *Westmoreland's* grant of the manor and hundred to appellant's ancestor's, or in Queen *Elizabeth's* grant of confirmation, in the 43d year of her reign, felons goods were not granted by express name; yet appellant insisted that it was a full answer to those objections, that the manor and hundred were granted by Queen *Elizabeth* to appellant's ancestors, with the same rights, jurisdictions, privileges, pre-eminences, and immunities, and all franchises, liberties, customs, profits, modities, emoluments, and hereditaments whatsoever, and in as full, free, and intire a manner and form as *Hervey*, then late Earl of *Westmoreland*, or any other before that time ever had, and enjoyed the manor under any

1702.

any charter, gift, concession, or confirmation of the Queen or her predecessors; or by reason, or under colour of any lawful prescription, use, or custom before that time had or used, and in as free, full, and ample manner as the Queen or her predecessors before that time had, or enjoyed the same; and in as full and ample manner as the said manor and hundred came into, and then were in the Queen's hands: And appellant shewed that, pursuant to and under such grant of confirmation by the Queen, he and his ancestors had quietly, and without interruption, enjoyed the goods of all felons within the manor and hundred to this time; and appellant alleged that he could make out by ancient grants, inquisitions, court-rolls, and other sufficient matters of record, that the Earl of *Westmoreland*, and divers other Lords of this manor and hundred, had from the time of King *John*, down to the time of Queen *Elizabeth's* grant of confirmation, without a single instance to the contrary, enjoyed the goods of all felons within this manor and hundred; an that in those early days, felons goods passed under other and more general words than *bona felonum*: Notwithstanding all which the Court of Chancery, the 6th *July*, 1698, decreed, that a bill brought by appellant for discovery of the estate, and satisfaction of the money due on the bonds, should be dismissed, and, on a cross bill brought by respondent, decreed appellant to deliver up to respondent the said two bills obligatory, and a bond due from one *Wood* in the pleadings mentioned, and all other the said *Wyke Parker's* personal estate, that had since the felony or conviction come to appellant's hands or use; and that respondent should hold and enjoy all to his own use against appellant, and all claiming under him; but appellant insisted that he ought not, after so long and quiet an enjoyment, to be concluded by the decree, without a trial at law to determine the right, the estate forfeited being near 30,000*l.* value, of which appellant claimed only the two bonds; and shewed, that the consideration pretended to be paid by respondent to the King for the whole forfeited estate, did not exceed 5000*l.*

Nicholas
Nicholls.

The respondent on the other hand shewed, that *Edmund Parker*, Esq. his father, had children by several wives, and a considerable real and personal estate, and as his family encreased, and circumstances varied, made several wills, and of his last appointed respondent sole executor and residuary legatee, and from

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time to time, recently before his death, repeated his good opinion of respondent, and died in *May*, 1691; and that a will was found among his loose papers, dated 8th *July*, 1680, by which *Wyke Parker*, a younger son, was appointed executor and residuary legatee, and no later will appearing, there was reason to suspect that several subsequent wills had been destroyed or concealed: However, *Wyke Parker* disliking family difference, and being sensible some later wills had been suppressed, made overtures of accommodation; and, in *June*, 1691, it was agreed that *Wyke Parker* should, by good conveyances, grant and allure to the respondent, his executors, and assigns, all the testamentary estate of *Edmund*, which *Wyke* could claim under the will; and in consideration thereof, respondent covenanted in all events to pay him 8000*l.* and indemnify him from all legacies and charges of his executorship; and that part of that 8000*l.* was paid, and the residue secured by the two bonds; and that this agreement was afterwards by consent decreed and confirmed in Chancery, and administration to the father granted to respondent; but that *Wyke*, contrary to the agreement and decree, received several great sums of testator's estate in respondent's prejudice, to upwards of 1500*l.* and occasioned great expences to respondent, for all which he promised to make satisfaction out of the monies due on the bonds: And that, in *July*, 1693, before they had settled their accounts, *Wyke* was convicted of murder, and thereby these bonds, which were in his possession, became forfeited to the Crown, and the money being demanded by his late Majesty's Attorney General for the use of his Majesty, respondent applied to his Majesty, who, in consideration of 5000*l.* really paid by respondent, by letters patent, 19th *April*, 1697, granted *Wyke*'s forfeited estate to respondent; who thereupon became legally intitled to the remainder of the money due on the bonds: And that, after the conviction, several persons, as lords of manors, had pretended a right to the bonds; and among the rest appellant, who by collusion with others, got them into his custody, on pretence that he being lord of the manor and hundred of *Lifton*, in the county of *Devon*, where the bonds were (as he alleged) at the time of the murder and conviction, the same were forfeited to him, and that he was intitled thereto, (as he pretended) by virtue of a grant from the Crown of felons goods; and therefore brought

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Cases in parliament.

{ 1702. } a bill in Chancery against respondent, to compel payment of the remainder of the money due on the said bonds: And that respondent having answered, afterwards exhibited his bill of interpleader against the several pretenders, to discover their several rights: And the Attorney-General likewise exhibited his bill at the relation of respondent, who claimed the same by virtue of the letters patent aforesaid. And that all three causes being ready for hearing before the late Lord Chancellor, and appellant's council informing his lordship that matters of law would arise, his lordship called to his assistance *Powell* and *Peswys*, justices; and the three causes were heard together before his lordship and the two judges, 6th July, 1699; when after long debate, and reading appellant's letters patents and records, and all the proofs on either side, his lordship and the judges unanimously agreed in opinions, that the goods and chattles of felons were a flower of the Crown, and that felons goods could not pass from the Crown by implication, but only by grant, by plain and express words; and that usage or prescription could not divest the Crown of that which can only pass by matter of record: And appellant, and the other pretenders, failing in proof of any grant, it was ordered and decreed, that the bonds should be delivered up to be cancelled; and that respondent was well intitled to the same, and therefore dismissed the appellant's bill; and that the appeal was not brought till almost three years after the decree; and that appellant now, in aid of his appeal, objected that he and his ancestors were intitled to felon's goods, under several letters patents, grants, matters of record and otherwise, and had enjoyed same without interruption for 500 years; and that respondent's letters patents were granted *pendente lite*, and that the matter ought to have been tried law: To all which respondent answered, that appellant did not, nor could shew any patent, whereby felons goods were ever granted to him or his ancestors; and that the usage contended for, was an encroachment on the Crown, and created no right to appellant, nor bar to the Crown: And that, as to a trial at law, appellant had made his election to sue in Chancery; and that the opinion of the two common law judges, besides the Lord Chancellor's, was against him upon a full and fair hearing of all his evidence: And that respondent was a purchaser for good and valuable consideration

tion from the Crown, and ought to enjoy the benefit of his purchase.

Die Veneris, 27^o Martii, 1702. After hearing council on this appeal, the Lords ADJUDGED that it should be dismissed, and the decree affirmed; and that appellant should pay respondent 10*l.* for his costs. *Lords Journ.* vol. xvii. p. 84.

Note. A case of this name is reported in Vent. 4 Mod. Salk. Carth. and Skin. but it is not the same case.

Sir

1702.

Sir Jeffery Jefferys, Knight, - Appellant.

Mr. Attorney General, and the } Respondents.
 Commissioners of the Customs, }

Case 42. **T**HE appellant made this case: That, by an Act of Parliament, 1 *Yae.* 2. an additional duty of 3*d.* per pound was laid on all tobacco imported between the 24th *June*, 1685, and the 24th *June*, 1693, to be paid after this manner, *viz*: The importer was to give a bond to the King, with condition, not to deliver the tobacco to any consumption or retailer before the duty paid; or if the importer should not sell, or export the tobacco in eighteen months, that then he should pay the duty: And that, in regard tobacco was liable to waste and decay, during the time it might so remain on the importer's hands, before sale or exportation, the Commissioners of the Customs were impowered to make such allowance for the same, as in their judgments should seem meet, considering the quality of the tobacco, and the time of its lying by; such allowance not to exceed 8*l. per cent.* in the whole: And that the Commissioners of the Customs were required every three months, or oftener, to call on the merchants to bring in their accounts of all the tobacco liable to the duty which remained in their hands; and, if any merchant should, upon notice, refuse to give such account, he should pay the full duty of the tobacco he should stand charged with in his impost account; but, if the merchant or importer should bring in such account, then the Commissioners of the Customs might appoint an officer to search the warehouses of such merchant, and compare the tobacco there with his account given in; and, if the merchant, or importer, should not clear his impost account, either by sales, or exportation, within eighteen months, from the time of importation, he should answer and pay the duty as if the tobacco had been sold for retail, but allowance to be made for waste in manner aforesaid: And that, during the continuance of that act, appellant imported into England great quantities of tobacco, most part of which was consumed there, and the residue exported: And shewed further, that the method directed by the act was found almost impracticable, and very oppressive

1702.

oppressive to the merchants; and that complaints were made to the Commissioners of the Customs of the late King *James*, who, without inquiring into the circumstances of the commodity, as the said act directed, made one general order, that *4l. per cent.* should be allowed for waste and decay; and that such allowance should be made to those only who should, by writing under their hands, consent thereto: And that appellant applied to the Commissioners to have a greater allowance than *4l. per cent.* for waste and decay, and damages occasioned by his tobacco lying by; which the Commissioners refused, altho' it was generally damaged *8l. per cent.* and a great part of it more: And that, by another act, 7th and 8th of the late King *William*, the tobacco duty was continued to 29th September, 1701; and that this last act declared, that the methods prescribed by the former act, for collecting the duty, had been found prejudicial to trade, and grievous to the merchant: Therefore it was enacted, that on payment of the duty for tobacco consumed in England, there should be an allowance of *8l. per cent.* for waste and shrinkage, and *4l. per cent.* in consideration of all tobacco exported: And that appellant had answered several great sums of money for duty on his tobacco, but never closed his impost accounts, and the Commissioners of the Customs refused to make him any further allowance than *4l. per cent.* for waste and decay: And that therefore appellant exhibited his bill in the Exchequer against the Attorney General and Commissioners, to make up and settle the appellant's impost account: And the Attorney General exhibited his bill against appellant for the same purpose: And that witnesses were examined on both sides, and appellant had fully proved, that his tobacco was damaged most of it *8l. per cent.* and a great part of it much more, by waste and decay in the cellars and warehouses: And that both causes were heard, and afterwards re-heard; and that the Barons decreed, that no further allowance than *4l. per cent.* should be made to appellant for waste and decay; and that the auditor should state appellant's impost account, with that allowance only; and appellant insisted he was aggrieved by this decree, for that the order made for allowing *4l. per cent.* generally, was not warranted by the act of parliament, but that an allowance ought to be made according to the circumstances of the commodity; and that such general order could never answer all cases and circumstances;

1702.

circumstances; and that it was not to be supposed that the importer should bring to the Custom-house every parcel of tobacco he sold for retail, to be inspected by the Commissioners; nor that the Commissioners should go to the importer's warehouse to view the same; but that the damage was to be made appear by sufficient evidence: And that appellant having fully proved that his tobacco was damaged *8l. per cent.* the commissioners ought to have made him that allowance, and insisted that the Court of Exchequer ought to have directed a trial at law to ascertain the damage, which had been refused.

Sam.
Dodd.

The respondents, in affirmance of the decree, made this case; that the ascertaining that allowance, according to the methods prescribed by the first act, being very troublesome to the merchant, appellant, and several other traders in tobacco, made application to the Commissioners of the Customs, to make a certain allowance for waste and shrinkage, while the goods might lie by; and thereupon obtained two orders, in *October*, 1685, and *July*, 1681, to have the allowance ascertained at *4l. per cent.* as well for tobacco exported, as for that consumed in England. And that in pursuance of those general orders, appellant, who after the making the act, and before 1st *May*, 1696, did import great quantities of tobacco from time to time, had the said allowance, and gave receipts for the same: And, notwithstanding this, appellant, after his tobaccos were all either sold, or exported, and long after the duties ought to have been paid, demanded an allowance, pursuant to the act, according to the circumstances of his commodity, and being prosecuted by the Attorney General, for non-payment of the balance of his impost account, being 6527*l.* 1*s.* 7*d.* exhibited his bill in the Exchequer against the Commissioners and Officers of the Customs, setting forth his demand, and pretending that the circumstances of his tobacco were such as to deserve *8l. per cent.* allowance; and that by virtue of that act, or by the act of King *William*, he ought to have such allowance; but that the Barons were unanimously of opinion, that his impost account should be made up, with an allowance of *4l. per cent.* only, and that decree was affirmed, on a re-hearing in the last term, and which decree respondents insisted ought to be affirmed the Lords; because the appellant had, from time to time, received the allowance

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allowance of 4*l. per cent.* and given receipts for it, and had thereby excluded himself from demanding any other allowance: And that it did not appear by any proofs in the cause, that appellant ever made any application to the board, whilst his tobaccos were in being, for an inspection to be made of the waste and shrinkage, in order to intitle himself to any greater allowance: And that appellant's tobaccos have been sold or exported, long before his bill exhibited, and without his having desired the officers to view them, so that appellant had, by his own act and neglect, rendered it impossible for the King's officers to examine into the circumstances thereof: And that the act of the 7th and 8th of the late King, gave the allowance of 8*l. per cent.* for waste of tobacco consumed here, which were imported after 1st May, 1696, but did not any way concern tobaccos, imported before that day, as all the appellants tobaccos were.

Jo.
Hawles.
William
Cowper.

Die Lune, 20^o Aprilis, 1702. After hearing council on this appeal, it was ORDERED, that the same should be dismissed, and the decree of the Court of Exchequer therein complained of affirmed. *Lords Journ.* vol. xvii. p. 104.

Sir

1702.

Sir Francis Charlton, Bart. James } Appellants.
 Mas. n. and George Tomkins,

James Bayly and Ambrose Sparry, } Respondents.
 Clerks,

Case. 43

THE appellants stated, that respondents, as first and third rectors of *Burford*, in the county of *Salop*, in *Michaelmas* term, 1699, brought their bill in the Exchequer against appellants, for the tythes and customary payments within the township or manor of *Whitton*, as being one of the chaptries within the parish of *Burford*, belonging to the rectory: And that appellants, in *Easter* term, 1700, answered, that appellant, Sir *Francis Charlton*, was lord of the manor, and the other appellants his tenants there; and that the manor consisted of demesne and other freehold lands, called township lands: And that Sir *Francis*, and his ancestors had, immemorially paid the first and third rectors a *modus* of 7*l. per annum*. in discharge and satisfaction, for all tythes arising upon the demesne lands of the manor: And that the freeholders and tenants of the township lands, had immemorially paid them a *modus* of 5*l. per annum*. in discharge of the tythes of the township lands: And that after several witnessess examined, the cause was heard 5th *February*, 1701, when the Court adjudged against the *modus's*, and denied it to be tried at law, and decreed appellants to account for tythes in kind: Notwithstanding appellants had proved the *modus's* to have been paid for several generations without any variation; and also gave probable evidence, that tythes never had been paid in kind: And that though a witness examined for respondents had sworn that the parson, upon the death of one of the rectors, going about to know the value of the tythes, Sir *Francis Charlton* gave him an account of his cows, milk, eggs, and other tythes; yet appellants alleged, that it would appear on a trial at law, that this witness deserved no credit; and that respondents pretences, that appellant's father, Sir *Job Charlton's* cryer, was steward of his estate, and had made a composition for the tythes with the rectors: And that Sir *Job Charlton* had been a judge for many years, and his reputation and affection for the Church unquestionable; and that

he always constantly did never paid the decre subject to law: And able at law appellant yond conought to try the The 1 that to t parsons, portione chapels within t had been belonged was the Sparry, tythes, t of *Whit* pellants dents ex and tha 12*l. per* prayed: Barons rect such tythes; affirmed cient ter *Herefor* dred yee belonge the thir modus v proofs, ton, ha former 1679, then fir steward *Job* and

he always declared, as his father before him had constantly done, the 7*l.* and 5*l.* to be the *modus*'s, and never paid tythes in kind; and appellants insisted, that the decree tended to destroy ancient *modus*, and to subject the estate to tythes in kind, without any trial at law: And that the right of a *modus*, was properly triable at law, and such a trial rarely, if ever denied; and appellants alleged they would be able to prove it beyond contradiction on such trial; and that the decree ought to be reversed so far as to give appellants liberty to try the right at law.

The respondents in affirmative of the decree stated, that to the parish of *Burford* belonged three rectors or parsons, presented as first, second, and third rectors or portioners of the parish church of *Burford*, with the chapels thereunto annexed; and that all the tythes within the several townships or vills in the parish, had been for time out of mind distinguished, as to what belonged to each portioner; and that respondent, *Bayley*, was the first portioner or rector, and the respondent, *Sperry*, the third, and intitled amongst other parochial tythes, to all the tythes within the manor and township of *Whitton*, (*viz.*) each to a moiety; and that upon appellants refusing to set out or pay them the tythes, respondents exhibited their bill against them in the Exchequer; and that they, by their answer, insisted upon a *modus* of 12*l. per annum.* in lieu of tythes; and upon the hearing, prayed a trial at law, whether a *modus* or not; but the Barons unanimously declared, there was no ground to direct such a trial, and decreed appellants to account for their tythes; and respondents insisted that decree ought to be affirmed by the Lords, because it appeared by several ancient terriers and presentments, filed in the Bishop of *Hereford*'s Consistory Court, some made above one hundred years past, that one moiety of all tythes in *Whitton* belonged to the first portioner, and the other moiety to the third portioner, and no trace in any of them of any *modus* whatsoever; and also because it appeared in proofs, that the owners and occupiers of lands in *Whitton*, had made several agreements or compositions with former rectors, under hand and seal, (*viz.*) 20th *June*, 1679, between *Thomas Bannister* and *William Bishop*, then first and third portioners, and *William Biggs*, then steward to Sir *Job Charlton*, appellant's father, that Sir *Job* and his assigns should enjoy all the tythes belonging

1702. to the demefne lands in *Whitton* for three years, in as ample manner as Mr. *Bright* formerly enjoyed them, paying 7*l.* *per annum.* if the portioners lived so long: And 23*d.* of the same month, between the same portioners and *George Haycocks*, and *Edward Jones* of the township of *Whitton*, that they should enjoy their tythes in *Whitton*, and all other tythes in *Whitton* for three years, (except those before let to Sir *Job*,) paying *per annum.* 5*l.* 10*s.* and that the great charge and trouble in gathering the tythes in kind, which would have amounted to near the value thereof, obliged the portioners formerly to make moderate compositions: And that it appeared by proofs in the cause, that appellants had paid 12*l.* 10*s.* for upwards of twenty years past, which as well as the agreements, is inconsistent with the *modus* set up, that sum having been formerly equivalent to the value of their tythes; wherefore respondents contended, that the decree of the Court of Exchequer should be affirmed, and respondents not compelled to contest their right at law, appellant, Sir *Francis* being very rich, and powerful.

Con.
Phipps.

Die. Lune, 13^o Aprilis, 1702. After hearing council upon this appeal, it was ADJUDGED by the Lords, that the same should be dismissed, and the decree complained of affirmed. *Lords Journ.* vol. xvii. p. 95.

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1702.

James Hamilton and *Hans Hamil-* } Appellants.
ton,

Hans Stephenson, Esq. and *Ann* } Respondents.
 his Wife,

THE appellants made this case: That *James*, Case 44.
 Earl of *Clanbrassil*, upon his marriage with his

Countess *Ann*, made a settlement of lands of about 2000*l. per annum*, on her for her jointure; and afterwards by will, dated 18th *June*, 1659, made on his death-bed, devised one-third part of his estate to her for life, and the other two-thirds for maintenance of his only sons, *Henry* and *Hans*, and for payment of his debts; and if these two sons should die without issue before his debts paid, then the remainder after his debts paid to the eldest sons or issue male of his five uncles, as it could be laid out in most equal and just divisions; and soon after died: And that Countess *Ann* entered and enjoyed her jointure, and received the profits of the rest of the estate as guardian to her sons: And that *Hans*, the younger son, died without issue; and Earl *Henry*, the eldest, attained his age of 21 years, married, and then levied fines, and suffered recoveries of all the estate not in jointure to the Countess his mother, except some small parts that were in lease for lives; and by his will 27th *March*, 1674, devised all his estate in *Ireland* to his Countess *Alice*, her heirs and assigns for ever, and died without issue in *January*, 1675: And that Countess *Alice* entered into all the said Earl's lands, not in jointure to Countess *Ann*; and under Earl *Henry's* will, claimed the reversion in fee of the jointure lands alleging that Earl *James's* will was not good, he not having been of sound mind or memory when it was made: And appellant stated further, that the five eldest sons of Earl *James's* five uncles, mentioned in his will, (*viz.*) Sir *Hans Hamilton*, *James Hamilton*, of *Bangor*, Esq. *James Hamilton*, of *Neilsbrooke*, Esq. *Archibald Hamilton* and *Patrick Hamilton*, Esqrs. in *February*, 1675, filed a bill in the Court of Chancery, in *Ireland*, against Countess *Alice*, to perpetuate the testimony of the witnesses to Earl *James's* will: And that Countess *Alice*, in *April*, 1676, preferred a bill to set aside that will: And

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1702.

And that Sir *Hans Hamilton*, appellant, *James, Archibald* and *Patrick*, answered jointly, but *James, of Neilbrook*, answered separately: And, in *June, 1676*, preferred their cross bill, to prove the will of *Earl James*: And that Countess *Alice*, answered and denied the will of the said *Earl James*, and insisted that he was not of sound mind or memory; and many witnesses were examined on both sides, for and against the validity of the said will, and the evidence was contradictory: And that *James Hamilton, of Neilbrook*, the eldest son of the eldest of the said five uncles, claiming title to the whole estate by prior settlements, made by Lord Viscount *Claneboy*, *Earl James's* father, refused to go on any further in that suit; and thereupon Sir *Hans Hamilton, Archibald* and *Patrick*, impowered appellant *James* by letter of attorney, dated 19th *October, 1676*, to prosecute the same on their behalf: And stated further, that Countess *Alice*, by deeds of lease and release, 23d and 24th *August, 1676*, settled the said estate to the use of herself and the heirs of her body; and in failure of such heirs, granted 300*l.* rent charge thereout to her kinsman, *Richard Spencer, Esq.* and his heirs; and 50*l.* *per annum*, rent charge to *James Sloane, Esq.* and his heirs and subject thereto, granted all the estate to her brother, *Henry Moore, Esq.* then *Earl of Drogheda*, in tail-male, with remainders over, subject to her debts, particularly to 3000*l.* which she borrowed from Lord *Bargany*, whom she afterwards married, and soon after died without issue, in *December, 1677*: And that Sir *Hans* and appellant *James* were advised, that the remainder limited by *Earl James's* will to the five uncles sons, were barred by the fines and recoveries: And that a prospect of suits and great troubles appearing, concerning the validity and construction of *Earl James's* will, they, Sir *Hans* and appellant *James*, in *May, 1678*, for valuable consideration, purchased to them and their heirs, the several estates and interests of *Moore, Lord Bargany, Spencer* and *Sloane*, and enjoyed accordingly: And that they had made divers settlements in their families on marriages and other good considerations: And that *Archibald* and *Patrick Hamilton* were apprised of these matters, and, 24th *December, 1678*, came to an agreement with Sir *Hans* and appellant *James*, to accept one fifth part of the jointure lands, and of the lands in lease for lives, to be conveyed to each of them and their heirs by Sir *Hans* and appellant *James*: But that *James, of Neilbrook*.

1702.

Neilbrook, refused to join with the others in these proceedings or agreements, till after several years inquiry concerning the supposed settlement: But that he at length found he had been mis-informed, and solicited appellant *James* to undertake for Sir *Hans*, who was then absent, to agree to an award of indifferent arbitrators, and that he, for his part, would be bound thereby, which appellant *James* agreed to, and each chose an arbitrator; and, 5th May, 1680, entered into mutual bonds of the penalty of 1,000*l.* wherein appellant *James* was bound for his own, and Sir *Hans*'s performance of the award: And that the reference was had, and the arbitrators, *John Creighton* and *Hugh Hamill*, Esqrs. deceased, awarded Sir *Hans* and appellant *James*, to convey one fifth part of the jointure lands, and lands in lease for lives, to *James*, of *Neilbrook*, and his heirs, in like manner as they had done to *Archibald Hamilton*: And that *James*, of *Neilbrook*, acquiesced in the award, and never controverted it during his life: But before any conveyance made to *James*, of *Neilbrook*, pursuant to the award, Sir *Hans Hamilton* died in February, 1681, leaving appellant, *Hans Hamilton*, his grandson and heir, an infant; and *James*, of *Neilbrook*, died in September, 1683, leaving three daughters, *Rose*, *Rachael*, and *Ann*. And appellant stated further, that *William Hamilton*, third brother of *James*, of *Neilbrook*, taking the guardianship of the daughters, in *Michaelmas* term, 1683, filed a bill against appellants, suggesting that Sir *Hans* and appellant *James*, had made purchases in trust for all the other uncles sons, as well as for themselves; and prayed that the said purchases might be decreed to be a trust, as to one fifth for the three daughters; but took no notice of the award, which defendants in their answers insisted on: And that the cause was heard in *Trinity* term, 1686, before Lord Chancellor *Porter*, who declared that the whole matter was not brought fairly before the court, and that he would dismiss the bill; but on the importunity of respondents council, gave leave to file a supplemental bill, which was accordingly filed in *Michaelmas*, 1686; and stated the award, but alleged it was obtained corruptly: And that appellants severally answered and denied the trust, and insisted the award was fair, and said they were ready and willing to perform it: And shewed further, that Countess *Ann* died in *January*, 1688; and that *Rose* and *Rachael*, two of the daughters, died without issue: And that respondent,

Hans

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Hans Stephenſon, married *Ann*, the third daughter, and revived the cauſe, and witneſſes were examined on both ſides: And that pending the cauſe, appellants ſpecifically performed the award by a partition of the eſtate made, to which reſpondents were parties, and agreed and accepted of one fifth part of the jointure lands and leaſehold lands for lives, according to the ſaid partition, and their lot drawn, and ſtill held and enjoyed the ſame: And that appellant, *Hans Hamilton*, being then under age, gave ſecurity to perform the ſame, and accordingly did perform when he came of age: And that notwithstanding all this, reſpondents afterwards brought the cauſe to hearing; and *John Metbuen*, Eſq. Lord Chancellor of *Ireland*, 10th *February*, 1698, decreed the will of Earl *James* to be a good will, and that reſpondents ſhould have and recover one full fifth part of all the purchaſes made by Sir *Hans* and appellant, *James Hamilton*. And as to the award, his Lordſhip declared, he did not think himſelf ſo fully apprized of the matter as to confirm it, or to declare it corrupt or a bar to plaintiff's right, but left the parties to take their remedies thereon: And appellants ſhewed further, that purſuant to the Lord Chancellor's directions, appellants, in *Trinity* term, 1699, brought a bill againſt reſpondents, ſtating the award; and that appellants had ſpecifically performed it on their parts, and that reſpondents had accepted one fifth part of all the lands, ſo conveyed to them by appellants, upon an equal partition, and prayed a ſpecific performance of the award from reſpondents on their parts: And that to this reſpondents, 7th *December*, 1700, pleaded the proceedings and decree in the former cauſes; And that the ſaid Lord Chancellor *Metbuen*, 24th *July*, 1701, allowed the plea; but afterwards, on a re-hearing, his Lordſhip over-ruled the plea, and ordered it to ſtand for an answer; and that tho' the ſuit was ſtill depending, and many delays uſed by reſpondents therein, the Lord Chancellor, in *December*, 1701, ordered appellants forthwith to convey a fifth part of the ſaid purchaſes to the reſpondents, and ſince ordered the rents to be ſequeſtered; which decree and order appellants inſiſted ought to be reverſed as erroneous, becauſe none of the purchaſers were made, or intended to be made in truſt for *James*, of *Neiſbrook*; neither was there any proof in the cauſe of any ſuch truſt; and becauſe the award was good and binding on *James*, of *Neiſbrook*, and he had acquieſced in it during his life, and appellants

appellants had specifically performed the same after his death to respondents, who had ever since enjoyed benefit there-under; And because no order for sequestering the rents and profits ought to have been made pending the cause: And because, supposing the will of Earl *James* good, yet appellants contended, that no greater estate passed thereby to the five uncles sons, than for their lives only, and consequently the respondent, *Ann*, could have been intitled to nothing thereby.

Henry
Poley,
J. Sloane.

The respondents, in affirmance of the decree stated, that Earl *James's* will was in the words following: "If it do happen that my sons should decease without issue, or heirs of their bodies, before my debts paid, I do then appoint my debts to be first paid;" and then gives 20*l.* a year to the school of *Bangor*, and other yearly sums to other schools; "and the remainder of my estate to be divided in five equal parts amongst the eldest sons, or issue male of my five uncles, as the lands can be laid out in most equal and just divisions." And that he died soon after: And that his Countess *Ann*, his executrix, proved the will; and that her son, Earl *Henry*, after he came of age, married *Alice Moore*, one of the Earl of *Drogheda's* daughters; and, in 1675, died without issue, before Earl *James's* debts were paid: And that his brother *Hans* died long before without issue: And that the Countess *Alice* set up a title to the whole estate, under some will or disposition made by Earl *Henry*: And that the eldest sons of the five uncles, at the time of Earl *James's* will, were *James Hamilton*, of *Neilsbrook*, son of the eldest uncle; *Archibald*, son of the second; Sir *Hans* of the third; *James Hamilton*, of *Bangor*, (appellant) of the fourth; and *Patrick Hamilton*, of the fifth uncle; and that these five met soon after Earl *Henry's* death, at Sir *Hans Hamilton's* house, to concert what methods to take, and that Sir *Hans* and appellant, *James*, persuaded the other three, that Earl *Henry* had suffered a common recovery of all the estate, (except Countess *Ann's* jointure, and some old freeholds,) and had given all away to Countess *Alice*; but yet that would not hurt their title under the will; And that he had good advice, that it was not in Earl *Henry's* power to bar their estates: And that it was thereupon agreed at the desire of Sir *Hans*, that appellant, *James*, should be their agent, and take advice, and do what was most for their advantage, he

1702.

he taking Sir *Hans* advice, and the suits and proceedings to be at the joint charge of the five, and appellant was to be allowed 10*s.* a day for his expences: And that the bill to perpetuate was accordingly filed; and that Countess *Alice* preferred her bill, to set aside Earl *James's* will: And that Sir *Hans*, appellant *James*, of *Archibald*, and *Patrick*, answered jointly, and *James*, of *Neilbrook*, tearately, as shewed by appellants: And that Sir *Hans* and appellant *James*, 24th *June*, 1676, wrote to *William Hamilton*, at *Edinburgh*, *James* of *Neilbrook's* brother, that they were in suit for the *Clanbrassil* estate, whereof his father's family was to have an equal share; but that his brother *James* was doubtful to proceed, and desired him to haste over to settle matters, that they might bring it to a happy issue: And that *William* wrote back to them his fears of their agreeing for themselves, and persuaded his brother to join with them, which he did: And that thereupon Countess *Alice* offered *James*, of *Neilbrook*, 500*l.* a year, and above 1000*l.* to pay his debts, if he would not join them; which he not only refused, but also persuaded his niece *Hog*, one of the heirs at law, to break an agreement, made by her husband with the Countess for her interest, and to part with it to the five: And that thereupon Sir *Hans* and appellant *James*, entered into an agreement with the heirs at law for the use of the five: And that there were several cross suits, wherein all the five insisted on the title by the will: And that pending these suits, Countess *Alice* married the Lord *Bargeny*, and died in 1677, having previously settled the estate as shewed by appellants, but with a remainder to the Countess of *Dalboushy*, her sister: And that after her death, the five got possession of the two Mansion Houses, and procured the tenants to attorn, and agreed that Sir *Hans* and appellant *James* should prosecute their joint affairs as formerly, and end them by law or accommodation; and that each should advance 40*l.* for the future expences; and that *William Hamilton* advanced 100*l.* on his brother *James* of *Neilbrook's* account: And that Sir *Hans* and appellant *James* finding the *Moore's* were endeavouring to win Lord *Bargeny* to their interest, they on the other hand endeavoured to win him over, and at length did so; and that Sir *Hans* wrote two several letters, dated 30th *January*, and 2d *February*, 1677,

1677, to a Mr. *Kennedy*, a person appointed by the five, to assist appellant *James*, and one to *James*, of *Neilbrook*, that he had agreed with Lord *Bargeny*, and valued himself and his interest thereupon; and that the *Moore's* interest was much weakened thereby; and that things were like to be brought to a happy issue: And respondents shewed further, that *Henry Moore*, in *February*, 1677, preferred a bill against the five *Hamiltons*; and that Sir *Hans* and appellant *James*, 8th *May*, 1678, in name of the five *Hamiltons*, preferred a bill against *Henry Moore* and the other pretendes, to the effect of their former bills against Countess *Alice*: And that Sir *Hans* and *James*, of *Banger*, only, being in Dublin, 9th *May*, 1678, answered *Henry Moore's* bill, and insisted on the title by the will; and that the five, and not *Henry Moore*, had the right and possession; and on the day following, 10th *May*, 1678, purchased *Henry Moore's* interest for 2400*l.* and that this was kept a secret, even from Mr. *Kennedy*, and then appointed the other three to meet such a day, at Sir *Hans's* house, to receive a satisfactory account of matters; but before they came, Sir *Hans* and *James* had gone to Lord *Bargeny's*, and had then a formal assignment of Lord *Bargeny's* interest, made to themselves, the agreement previously made with him, was for all the five; and on their return, told the three, that they had purchased *Henry Moore* and Lord *Bargeny's* interest for their own use, and that the title under the will was worth nothing; and that the three should have no part, unless they would be contented with their shares of Countess *Ann's* jointure lands, and old freeholds; and that *Archibald* and *Patrick* were not able to contest; and after some years consented, being chiefly induced by one *Bayly*, who told *Patrick*, out of affected kindness, that he had a deed would destroy their pretensions under the will; and that he had got 500*l.* and lands of 60*l.* value, from Sir *Hans* and appellant *James*; and that *Archibald* and *Patrick* accordingly sealed articles with them; but *James*, of *Neilbrook*, refused and insisted on his right to a fifth of the whole, and was willing to pay his proportion of the purchase money: And in *May*, 1680, appellant *James* told him, he should have right done him by a reference; and that they two thereupon entered into bonds, to refer to *Creighton* and *Hamill*, who awarded, that *James*, of *Neilbrook*, should do to Sir *Hans* and appellant *James* as *Archibald* had done; and they should

do

do to him, as they were bound to do to *Archibald*: And that *James*, of *Neilsbrook*, finding himself imposed upon, and greatly injured by the award, never pressed the performance of it, but soon after became very sickly; neither did *Sir Hans* or appellant *James* ever desire it to be performed, but declined it; for *Sir Hans* refused, unless he got the Castle and gardens of *Killeleagh*, and 500*l. per annum* more than the award gave him; and that after *Sir Hans*'s death, appellant *James* confessed, that *Sir Hans* or he had no right when they made the agreement, and that Chancery might relieve them, but was confident of *James*, of *Neilsbrook*, *Archibald* and *Patrick*'s inability to force them; and declared of ten, that the three had neither friends nor money, and he would make them do what he pleased: And that *Sir Hans* died, 26th February, 1681, and left appellant *Hans*, his grandson and heir, and his estate to the guardianship of appellant *James*; but that *Sir Robert Hamilton* (the infant's father) soon after prevailed on appellant *James*, to let him have the possession and management of the estate; and assured him he had a great design, which he could not otherwise accomplish: And that *Sir Robert* and appellant *James* afterwards purchased the Countess of *Dalbousy*'s interest for 100*l.* And that respondent *Ann*, the daughter, and heir of *James*, of *Neilsbrook*, 30th December, 1683, preferred a bill in Chancery against appellants and *Sir Robert Hamilton*, to recover a fifth part of the whole estate; and that they in their answers, insisted on the purchases being for themselves, and not in trust; and that *Earl James* was non *compos mentis* when he made his will; and that they paid for their purchases above 4400*l.* And prayed, that if respondents would not take his offer, they might be barred of all advantage by the award, and left to their remedy under the will, &c. And that on the hearing, the Court decreed respondents a full fifth part of the whole estate, and an account to be taken of the income profits, subject to a fifth part of *Earl James*, *Earl Henry*, and Countess *Alice*'s debts, and of the purchase money: And inasmuch as the award was never executed, nor sought to be performed by either party, the Court left that matter open to each party, to take his legal remedy; and that appellants so far submitted to the decree, as to proceed in the accounts before the Master, and to demand, and get allowances for *Sir Hans*'s expences in making the purchases with interest, and other debts and demands;

demands; and that the Master made his report, and appellant had taken exceptions; and in order to keep respondents out of possession, and a fifth part of the money reported, had appealed from the decree, which respondents insisted was not erroneous as alleged; and that it ought to be affirmed, because, Sir *Hans* and appellant *James*, had, by writing, owned that *James*, of *Neillsbrook*, was to have a fifth part of the estate, and moved his friends to persuade him to join in a suit for the same, and promised in writing to make no separate agreement for themselves; and that they had accepted the trust, and received money to take advice on the title of the five; and that they prosecuted the suit during Countess *Alice's* life, and after her death joined with the three in taking possession of the two mansion houses, and in receiving attornments; and had sworn in their answers, that the title of the five by will was good, and that possession had run many years under it; and after the decree made, charged respondents with a proportion of all purchase money, and expences in making the purchases: And respondents insisted, the alleged award could conclude nothing, because the decree declared it neither good nor bad; and that appellants had brought a bill to have it performed, and that suit was yet depending; and that the rents were justly sequestered, because respondents right to the lands were upon a full hearing decreed for, and sufficient time allowed appellants to clear their accounts; and that it appeared by the proceedings, that they were fully paid before the decree: And all that they could charge against respondents: And whereas appellants objected, that the decree was founded on the validity of the will, without a trial at law first had, and that at best an estate for life only was given to the five uncles sons: The respondents answered, that the decree and orders were founded not only upon the validity of Earl *James's* will, but also upon the trust; and that there was not any necessity for a trial at law, because it was fully proved by witnesses of unquestionable credit, that Earl *James* gave orders for drawing it, and approved of it when read to him; and when he sat up to sign it perceived a blot in it, and ordered it to be written over again; and when that was done, and it again read to him, he in presence of many persons of integrity and character, called for pen and ink, and signed, sealed, and delivered it to his lady as his act and deed; and that he was perfectly in his senses,

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 senses, and never raved, nor spoke incoherently during his sickness; and that Sir *Hans* and appellant *James* had themselves sworn it a good will, and duly perfected, both before and after their purchase; as did Earl *Henry*, under whom appellants derived; and that Sir *Hans* had by his letter owned, that one of the witnesses against the will swore ignorantly, and the other over-reached himself; and that indirect means and bribery had been used, to cause witnesses to swear against the will; and that the will gave an estate in fee, inasmuch as it bequeathed the remainder of the estate.

Die Jovis, 16^o Aprilis, 1702. After hearing council on this appeal, it was ADJUDGED, that the order of the 24th *July, 1701*, should be reversed, and the decree made the 10th *February, 1698*, and the subsequent orders made in that cause be set aside, and the cause sent back into the Chancery, in *Ireland*, to the intent that both causes might be brought to a hearing together upon the whole matter; and that appellants should procure the cause in which they were plaintiffs, to be brought on to be heard as soon as might be by the course of the Court; and in case of the death of any of the parties, appellants to revive without delay.

Lords Journ. vol. xvii. p. 100.

Nicholas

Nicholas Trott, Esq.

- - Appellant.

Reignier le Cle, John Henry Myn-
skin, John Gillis, and Jeremy }
Vandermeer, Respondents.

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THE appellant stated that the respondents, 2d Case 45.
June, 1699, exhibited their bill in Chancery
against appellant, and thereby charged, that in 1694,
the ship *Gertruydt* sprung a leak near the Island of
Providence, where appellant was governor; and that
appellant, on a signal of distress, sent out boats with
men, on pretence of assisting her; but that instead of
stopping the leak, and bringing her into harbour, they
plundered her cargo to the value of thirty thousand
pounds, and brought all to appellant; but that appellant
had in his answer, filed 9th October, 1699, denied the
whole bill; and shewed, that about the time alleged,
three boats full of men had come to *Providence*, and
said they were the crew of a *Dutch* ship, which had
been cast away in the night time, about fifty leagues off
in the open sea, seventeen days before: That after
seventeen days sailing in their boats, *Providence* was the
first land they saw; and that they had come thither
to save their lives, and for provisions, for which they
would pay ready money, &c. and that they then sur-
rendered their arms, being ten fusils, and seventeen pi-
tols; and at their departure paid for their provisions,
some fifty pieces of eight a-man, some forty, some twenty,
and others ten, amounting in all to about three hundred
and fifty pounds. And appellant shewed, that all the re-
spondents own witnesses, had proved that the ship was lost
in the channel of *Bahama*, fifty leagues from *Provi-
dence*, seventy men, besides some *Spanish* passengers be-
ing on board; and that sixty-four of them, in three
boats, after seventeen days sail, had arrived at *Provi-
dence*, and were carried before the governor, who or-
dered them meat and drink, and ordered a sloop, with
one of the respondent's boats, to be fitted out to find
out where the ship or wreck was; and that respondents
pretended that none of the ship's crew were permitted,
or ordered to go, save one *Frenchman*, yet none of them
said they were denied or hindered; but that on the con-
trary,

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trary, appellant asked two more, and they refused, as being too weak to go on so dangerous a voyage; and that, tho' respondents witnesses had said, that at the return of the boats they saw several goods landed, which were saved out of their ships, yet that none of them said, the captain, lieutenant, or any of the ship's crew even claimed, or demanded any of them; neither did they say to whose hands those goods, or any other brought in by the sloop or boat which had been sent out to look for wrecks, had come; and that though the *Frenchman* confessed, they had saved thirty-three thousand pieces of eight; yet he did not say, out of which wreck those goods had been saved: And tho' these witnesses say, that they saw near twenty-men come out of appellant's house with pieces of eight in their hats, and appellant's face and hands black, as if with telling money; and that they might have had their arms again, for twelve pieces of eight a gun; and that these doings of appellant, were to the damage of the ship owners about twelve thousand pounds; and that at low water the cargo and tackle of the ship might have been saved: Yet appellant shewed, that his witnesses had proved that the crew had declared, they had run the ship on a rock, fifty leagues distant from *Providence*, and left her to save their lives; and that they had brought with them much gold and silver, and had saved 150*l.* or 200*l.* a man, which amounted to about 12,000*l.* and that they had left several men on board; and that others of their men had gone off into other boats, with a great quantity of money: And that appellant's witnesses proved further, it had been before, and since this wreck, a constant practice to fish for wrecks about the *Babana* islands, and to give the men that go on that service no wages, save shares of what they got; and that these very witnesses had gone to fish for wrecks, while this ship's crew were at *Providence*; and that all that was got from all the wrecks in general, was divided into between thirty and forty shares, according to the number of men every inhabitant sent; and that appellant had sent but two men, and had but two shares; that the witnesses never saw, heard, or knew he received, or was entitled to any more; and had proved, that nothing had been found above water, but that the divers declared, there were five wrecks; that the witnesses saw them dive, and bring up all that was gotten from under water; and that one *Abraham Marsb* had, according to the usual constant

constant custom been chosen quarter-master, and received into his custody, and divided all that was gotten in that adventure; and that all that was gotten, was taken up about five leagues from the place where the *Gertruydt* was lost, and that was above fifty leagues from *Providence*; and that other sloops, in which appellant was no way concerned, were fishing near the place for wrecks at the same time: And that he was notwithstanding decreed to account for the whole cargo, and lading of the ship, at the time she was cast away, and to be allowed only what he could prove to be embezzed by the seamen on board, and to pay what appeared due on such account with costs; and that this decree was erroneous, and ought to be reversed; and that appellant ought not to account for the whole, or any part of the cargo, unless he had insured it, or it had come to his hands or use, neither of which he contended was proved; but that the ship was lost fifty leagues from *Providence*, seventeen days before appellant ever heard of her; and part of the crew, who were left on board, might have embezzed the cargo, or it might have been lost in the sea, and never recovered, or taken up by other vessels passing by; and that the sixty-four men who came to *Providence*, had shared twelve thousand pounds among themselves; and that appellant was interested two shares only, out of between thirty and forty; and that all was dived for under water; and that the goods alleged to be part of this ship's cargo, were not sworn to by any marks, nor by those present at the diving or use: And appellant observed, that the respondents witnesses had sworn as to hearsay in *English*, tho' they did not understand that language; and had sworn positively to a negative, viz. that not one man was permitted or ordered, &c. and that a certain person was at the wreck, tho' they were not themselves there; and that appellant had proved that there were several wrecks, and other vessels fishing, and that what was dived for was five leagues off the place, where the crew declared the *Gertruydt* had been lost; and that it was customary to fish for wrecks, and that what was recovered, after lying at the bottom of the sea above a month, was in common to the finders, like other lost and derelict goods: And appellant complained it was fetter to compel him to account for all the cargo, unless after so many years he could find out so many foreigners dispersed all over the world, and then persuade them to declare what they

1702. they embezzled, and so accuse themselves; and insisted, that there were no proofs to warrant the decree: And appellant observed further, that the channel of the *Babama*, in *America*, where the ship was cast away, was also called the *Gulf of Florida*, a place very dangerous for shipping, (having a very impetuous current) and where many wrecks happen; and that it was as common for the people of the Bank of *Babama*, adjoining to this channel, to send sloops to fish for wrecks, as to send to *Newfoundland* to catch fish; and that this was the place where Sir *William Phipps* had some years ago received that great quantity of silver, wherein the late Duke of *Albemarle* and others were concerned.

J. Shaw.

The respondents on the other hand stated, that they were merchants of *Holland*, and proprietors of the ship, *Lady Gertruydt*, which ship was by them fitted out with divers rich goods and merchandizes for the *Spanish* trade, and manned with a captain and about eighty seamen, (she carrying above thirty guns) and had the late *King's* commission, as *Stadtholder* of *Holland*, to shew, if necessary, and that they were subjects of that nation: And that, in *January*, 1694, the ship sailed with her cargo and lading out of the *Texell*, for the *Spanish West-Indies*; and after some time arrived there, and disposed of the greatest part of her cargo and lading for pieces of eight; and on her return back for *Amsterdam*, on *Palm-Sunday*, 1695, on the banks, in the channel of *Babama*, sunk about six feet below water, having then on board thirty thousand pieces of eight, barrelled up in six casks, besides several barrels of silver and gold, and other rich goods and merchandizes, all which were recoverable; and that the seamen were forced to betake themselves to their long boat, and another small boat they had fitted up, and were in distress upon the seas for seventeen days, having nothing all that time to subsist on but a biscuit and a half, divided to each man when they left the ship, besides a few cockles and other small fish, which they got as they were cast on the rocks and reefs, and that they were at last driven upon the island of *Providence*, of which the appellant was then governor; to whom they applied, and shewed their commission, and acquainted him who they were, and from whence they came, and whither bound, and gave him an account of the misery they had suffered, and the loss they had sustained, and desired him to assist them with
a ship

a ship or boats, to recover the treasure, and the rest of the lading that was then on board the ship; and that the appellant, after a strict examination of the captain and seamen, produced to them a map of *America*, that they might thereby give him the more exact information of the place where the ship sunk; and that as soon as he had come to a perfect knowledge thereof, he made a shew as if he would assist them in recovering the cargo and lading; but instead of doing so, confined the master and seamen, and in the mean time fitted out a sloop, and the respondent's ship's boats with his own men, and sent them with one *Daniel Hardwin* (who had been in the ship when she sunk,) as their pilot, to shew them where said ship was; and that they arrived at the place, and recovered and possessed themselves of the cargo and lading, and carried them to *Providence* to appellant: And that respondents upon discovering all these proceedings, exhibited their bill against appellant for relief; and appellant answered, and witnesses were examined on both sides, and the cause heard 27th *June*, 1701; and respondents having proved their case, the decree appealed from was pronounced, which decree respondents insisted was just and reasonable, and ought not to be reversed.

Henry
Pooley.

Die Jovis, 19^o *November*, 1702. After hearing council upon this petition and appeal, it was ADJUDGED by the Lords to be dismissed, and the decree appealed from affirmed. *Lords Journ.* vol. xvii. p. 168.

Note Prec. Ch. 230. It appears that a *ne exeat Regno* had been awarded against defendant, to which he had given bail; and that on the hearing of the cause, 19,000*l.* had been decreed against him; and that he was committed for non-payment.

John

1702.

John Sharpe,

Appellant.

Daniel Thomas and Benjamin White, Respondents.

CASE 46. **T**HE appellants stated, that *William Taster*, and *Jonab Lewis*, deceased, were possessed by virtue of several leases of two several messuages on *Tower-hill*, and that in 1683, *Taster* mortgaged his lease and house to appellant for 55*ol.* and *Lewis* mortgaged his lease and house to appellant for 100*l.* by distinct deeds; and that appellant afterwards, in *September*, 1683, borrowed 200*l.* from *Elizabeth Thomas*, and assigned over these mortgages as security, and gave bond 400*l.* penalty for performance of covenants; and that this 200*l.* was lent by the brokerage of respondent *White*, whom Mrs. *Thomas* employed to receive and put out money for her; and that *White* had called upon *Taster* and *Lewis* for the principal money and interest, and from time to time received several sums from them; and that appellant never was called upon either for principal or interest for fourteen years together; and that after Mrs. *Thomas's* death, in 1697, respondent *Daniel Thomas*, her executor, brought an action against appellant on the bond to perform covenants; and appellant believing the whole money paid to Mrs. *Thomas* by *Taster* and *Lewis*, exhibited his bill in Chancery, to discover their payments to her or *White*: And that respondents had put in several answers, and respondent *Thomas* annexed an account to his answer, of what he computed to be due for principal and interest; and stated that respondent *White* had received 37*l.* in full of all interest, for the 200*l.* borrowed by appellant to 6th *October*, 1686; and that *White* had further received from *Taster* 50*l.* and from *Lewis* 35*l.* in part of appellant's mortgage; and that respondent *White* had by his answer confessed, he received from *Taster* and *Lewis*, towards satisfaction of appellant's mortgage, about 140*l.* viz. about 50*l.* from *Taster*, and about 90*l.* from *Lewis*; but said he had paid Mrs. *Thomas* only 122*l.* of that money, and had retained the rest towards satisfaction of other monies due to him from appellant, upon a bond of 200*l.* taken in the name of one *John Ingle*, in trust for respondent *White*: And that the cause came to be heard before Lord

Lord Chancellor *Somers*, 31st *October*, 1698, who decreed, that respondents should account with appellant before Master *Kerk*, for what they had received from *Tasfer* and *Lewis*, on account of appellant's mortgage; and that the payments to *White* should be a good payment to *Thomas*; and both of them to be examined upon interrogatories in aid of the account, and to produce their books before the Master, who was to report specially any difficulty in taking the account; and reserved costs till the report returned: And appellant stated, that *White* had been served with many summonses and orders before he would produce his books; and that two orders were made for his commitment, unless he were examined by a limited time; and upon his examination before the Master, in *April*, 1699, he disclosed that he had received of *Tasfer* 70*l.* besides the 50*l.* mentioned in his answer, but pretended that he had lent *Tasfer* 200*l.* more of his uncle *John White's* money, and that he had paid Mrs. *Thomas* 37*l.* for interest money, before he had received any from *Tasfer* or *Lewis*; and that he would apply 37*l.* of the 90*l.* received of *Lewis*, to reimburse himself that 37*l.* and that he intended to apply the 70*l.* received from *Tasfer*, some part towards the discharge of his own debt in *Ingel's* name, and the rest towards the discharge of *John White's* debt; and that *White* did not pretend by his examination that he had applied the 70*l.* nor even discover that he had received it till this examination, though he had received it thirteen years before; nor did he take the least notice of any debt at all due to *John White* in his answer to the bill; neither was there any proof of any such debt in the cause; nor did *White* by his answer insist to retain more than 18*l.* of the money in his hands, towards satisfaction of the debt pretended to be due to him from appellant: And appellant insisted, that such alleged application of the 70*l.* could not be just; for if *Tasfer* paid it him, towards satisfaction of appellant's mortgage, then he ought not to apply any part of it towards satisfaction of *John White's* mortgage; and if it was paid towards discharge of *John White's* mortgage, then he ought not to apply any part of it towards the discharge of his, respondent *White's* debt due from appellant: And further stated, that the Master, 21st *March*, 1699, made his report, and charged respondent *Thomas* with the 37*l.* received by respondent *White* for interest money, with the 90*l.* received

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ceived by *White* from *Lewis*, and the 50*l.* received by him from *Tasfer*; and the Master gave this reason, viz. because *White* by his answer confessed, that those two sums were received by virtue of the appellant's mortgage; and reported the matter of the 70*l.* received from *Tasfer* specially, as it appeared upon *White*'s examination: And that respondent *Thomas* took exceptions to this report, which were argued 16th *December*, 1700, before the Lord Keeper; who declared, that respondent *Thomas* ought not to be charged both with the 90*l.* received from *Lewis*, and the 37*l.* received from *White*, for that *White* had deducted (as he might) the 37*l.* out of the 90*l.* and therefore his Lordship charged respondent *Thomas* only with the 90*l.* and as to the 70*l.* received by respondent *White* from *Tasfer*, besides the 50*l.* which *Thomas* had brought to account as received, his Lordship declared that it ought not to be applied to the account of the respondent *Thomas*'s mortgage, but did not give any directions how it should be applied, and ordered the Master to take the account as to principal and interest, according to those directions, and to tax *Thomas* his costs: And that appellant, 2d *August*, 1701, procured this matter to be re-heard, when the former order was affirmed; and appellant insisted, that according to this order, respondent *Thomas* was discharged of the 37*l.* which he had charged himself with, and given appellant credit for in his answer; and that *White* was allowed to deduct it out of the 90*l.* although by his answer he insisted to retain only 18*l.* of it to his own use; and that as to the 70*l.* respondent *White* had liberty to keep it, and apply it as he pleased; whereas, in justice, it ought to be applied towards discharge of appellant's mortgage; and that *White* had done unjustly in concealing it for thirteen years together, and in not having discovered it by his answer, nor until he was driven to produce his books before the Master, and then confessed it to be in his hands, not applied to one person or another: And appellant shewed, that it was more over proved in the cause, that upon discourse between appellant and respondent *White*, about the debt due from *Tasfer* to appellant, *White* confessed that he had caused *Tasfer* to be several times arrested, and had received several sums of money of him, which implied that such arrest was for appellant's debt; and insisted that the money paid by *Tasfer*, ought to be applied

applied towards discharge of the debt he was so arrested for: And insisted further, that the respondent *Thomas* ought to be charged as well with the 37*l.* he confessed to have received for interest money, as with the 50*l.* and 70*l.* received from *Tasler*, and the 90*l.* from *Lewis*; or, at all events, if *White* be allowed to retain 37*l.* which he pretended to have paid *Thomas* for interest money before he received it, he should retain it out of the 70*l.* he had still in his hands, and answer the overplus of the 70*l.* to *Thomas*, towards the discharge of his mortgage; and that the costs should be laid upon *White*, who had been the chief occasion of them.

Abel Ket-
tledery.

The respondent *Thomas* on his part alleged, that there appeared extraordinary shifting and vexation on appellant's part, to keep him out of a just debt: And stated, that before appellant's assignment to *Elizabeth Thomas*, *John White* had lent *Tasler* 200*l.* on a mortgage, and that *Benjamin White* was trusted as a scrivener by all parties, and procured the money, and made all the securities, and had, as usual amongst scriveners, paid *Elizabeth Thomas* 37*l.* of his own money for interest; and that *Lewis* had paid 90*l.* and *Tasler* 120*l.* to *Benjamin White*, without mentioning on what, or whose particular account; and that respondent *Thomas* had sued appellant on his bond, and obtained judgment; and appellant had filed his bill, to be relieved against that judgment; on pretence that the debt due to Mrs. *Thomas*, or the greater part of it, had been paid either to her or to *Benjamin White*, her scrivener, although *White* never paid over the money to her; and that upon the account before the Master, the only doubt insisted on by appellant, was how *Benjamin White* had applied the several sums of 90*l.* and 120*l.* among the creditors: And that had it appeared upon *Benjamin White's* examination, who had been examined as a witness at appellant's instance, that he applied 37*l.* part of the 90*l.* received from *Lewis*, to reimburse himself the 37*l.* so advanced to Mrs. *Thomas*; and that he received the residue of the said 90*l.* as on her account; and that he applied only 50*l.* part of the 120*l.* received from *Tasler* to the use of Mrs. *Thomas*, and the remaining 70*l.* to the use of *John White*, another creditor of *Tasler's*: And that it was finally decreed, that

1702. Respondent *Thomas* should recover against appellant the residue of what was due for principal, interest, and costs, amounting to 338*l.* 18*s.* 8*d.* And respondent shewed, that appellant *Sharpe's* defence in the cause had been vexatious and troublesome; for that after the Master had made his first report, it went back at *Sharpe's* instance for re-examination; and after a second report, upon exceptions taken thereto, it was decreed with the respondent *Thomas*; and that after a third report, in favour of respondent, the Court indulged appellant with a re-hearing of the whole matter; and that after a decree on the re-hearing, the Master, by a fourth report, certified 338*l.* 18*s.* 8*d.* due to respondent *Thomas*; and that appellant, though served with the decree, refused payment; and that respondent *Thomas* had, by leave of the Court, sued the recognizances which appellant had given to perform the decree, and obtained three several verdicts against the sureties; and that appellant then brought writs of error in them all, which were still depending; and therefore respondent insisted the decree and orders ought to be affirmed Roger Acherley. with exemplary costs.

Die Martis, 24^o *Novembris*, 1702. After hearing council upon this appeal, it was ADJUDGED that it should be dismissed, and the order complained of affirmed. *Lords Journ.* vol. xvii. p. 172.

The

1702.

The Right Honourable *Edward Earl of Orford*, Lord *Robert Russel*, Lady *Letitia*, his Wife, *William Bridges*, and *William Thornburgh*, Executors of *Francis Russel*, Esq. deceased, who intermarried with *Katherine Lady North* and *Grey*, Executrix of *Charles Lord North* and *Grey*, deceased,

Appellants.

Richard Dashon, Esq. and *Henry Alnat*, Respondents.

THE appellants made this case, that *Charles Lord Case 47.*

North and *Grey*, seized in fee of the manor of *Saxon-ball*, and other lands in *Cambridgeshire*, in consideration of 4000*l.* granted a rent-charge of 400*l.* thereon to respondent *Dashon* for life; and by lease and release, dated 30th and 31st *May*, 1684, conveyed the lands to him and his heirs, as a security for payment of the annuity, and covenanted to pay it duly, and died 11th *January*, 1690, and made *Katherine*, his wife, sole executrix and devisee of his estate, who married *Francis Russel*, Esq. 30th *April*, 1691; and that respondents, in *Michasmas*, 1692, brought their bill in Chancery against *Francis Russel* and his wife Lady *North*, to discover Lord *North*'s real and personal estate, and to be paid the arrears of the annuity and interest; and that *Russel* and Lady *North* put in their answer 9th *May*, 1693, and for an account of testator's estate, referred to a book of accounts of all their receipts and disbursements, which they were ready to produce: And that the cause was heard 1st *March*, 1693; and it was decreed that *Russel* and Lady *North* should account for the personal estate, and for the rents of the real estate, chargeable with respondents demands: And that before any further proceedings, *Russel* and Lady *North* died in *Barbadoes*, 7th *August*, 1696, he having made his will, 2d *March*, 1694, and appellants, his executors, against whom respondents revived the cause, in *Hilary*, 1696; and they in *Easter*

{ 1702. } *Easter* term, 1699, answered the bill of revivor, and set forth a true account of their testator's personal estate, and of their disbursements: And that the cause was heard, 3d *July*, 1699, and the Court decreed an account of what came to the hands of the testator *Russel*, of the personal and real estate of the Lord *North*, subject to *Daston*'s demands since *Russel*'s intermarriage with Lady *North*: And that the Master made his report 1st *July*, 1701, and charged appellants with the whole assets of Lord *North*'s estate, amounting to 4752*l.* 13*s.* 3*d.* and (*inter alia*) certified, that there rested in the hands of *Russel* (after just allowances) 2075*l.* 3*s.* 7*d.* And that appellants, 26th *July*, 1701, took exceptions to the report, for that the Master had not allowed them 702*l.* 10*s.* which their testator had actually paid to a Mrs. *Hatton* on a bond, due to her from Lord *North*; and also for that he had charged appellants with the whole assets of Lord *North*'s estate, though Lady *North* had, before her intermarriage, paid away 1389*l.* 11*s.* 8*d.* for his debts and funeral, with which *Russel*'s estate ought not to be charged; and that these exceptions were argued before the Lord Keeper, 17th *December*, 1701, when it was ordered, that as to the 702*l.* 10*s.* it should be re-referred to the Master, to examine when that money was paid by *Russel*, viz. whether before or after *Russel* had appeared, or was served with process, to appear to the respondent's original bill; and the other exception, as to the 1389*l.* 11*s.* 8*d.* was over-ruled: And that the Master, 10th *February*, 1701, made his further report, that it appeared by the six clerk's certificate, that *Russel* and the Lady *North* appeared to respondent's bill in *Michaelmas* term, 1692, and that the 702*l.* 10*s.* was paid to Mrs. *Hatton*, 25th *March*, 1693; and that the matter on the Master's further report was heard, 2d *June*, 1702, and the Lord Keeper over-ruled the exception touching the 702*l.* 10*s.* and ordered that money to be paid by appellants to respondents, notwithstanding their testator had actually paid it before to Mrs. *Hatton* in discharge of her bond; and that though appellants had procured the other exception, as to the 1389*l.* 11*s.* 8*d.* to be re argued, they could not obtain any relief therein; from both these decrees or orders of 17th *December* and 2d *June*, therefore the appeal was brought, and appellants insisted both ought to be reversed, because, as to the first point, the

702*l.*

70*l.* 10*s.* due to Mrs. *Hatten* by bond, was a debt of equal nature at law with respondents demands, and if both had been sued for at law Lord *North*'s executor might by law, have preferred which he pleased; and that this judgment in equity, would in this instance change the law, and create infinite mischief to executors and creditors; for then, if any creditor having a demand in equity, though never so uncertain as this was, should file his bill against an executor, the executor after service of a subpoena, could pay no debts, though never so legal or well ascertained, till such suit in equity determined, though it should be ten years depending, as this had been, and in the mean time may be sued at law by other creditors, and could not plead the suit in equity in barr of such suits at law; and that it might so happen, that an executor might, pending such equity suit, waste the assets, and all the creditors be defrauded: And appellants submitted, that the presidents which governed this case in Chancery were of very late date, and had not been affirmed by any judgment of the Lords: *M. 1697. Testps v. Men.* And that as to the second point, the decree was, that appellants testator should answer only what came to his hands after his intermarriage with the Lady *North*, 79. and his estate ought not to be charged with what she had paid away before her marriage with him; and that it appeared by full proofs in the cause, that the 138*9*/. 11*s.* 8*d.* had been paid away by her out of the assets before the marriage, and therefore could not possibly have come to his hands after the marriage.

Samuel
Dodd.

In the circumstances of the case, respondents altogether agreed with appellants, and submitted to the Lords, that there were but two questions; the first, whether the voluntary payment to Mrs. *Hatten*, a bond creditor, without compulsion of law, or any proceedings to enforce it, made after a bill exhibited and an appearance thereto, was a good payment against the respondent, who was a creditor both by bond and covenant? And respondents contended, that the standing rules of equity, had on all occasions adjudged such payments void and that there were many precedents to the same point; and as to the second point, that Lady *North* had, before her marriage with *Russel*, paid away several sums which were not allowed to his executors, respondents insisted, that these payments neither could or ought to have been allowed, for that *Russel*'s estate was

{ 1702. }
 was not charged with any thing received by the Lady before her marriage; and shewed that respondents were confined by that decree, to take the account from *Ruffel's* marriage only, and that nothing received or paid before could be brought into the account; and complained that respondent had been a dear purchaser of this annuity, and had travelled in this suit full ten years at great expence, and appellants had all his money in their hands, the very interest of which would bear their expence; and that there still remained due to respondent *Dafston* 3887*l.* so that if the 2186*l.* 15*s.* 6*d.* decreed to him were paid, he must still be a loser near 1700*l.* and that therefore the appeal ought to be dismissed with costs.

Wm. Doby.
 byns.

Die Sabbati, 21^o Novembris, 1702. After hearing council upon this petition and appeal, it was ORDERED and ADJUDGED by the Lords, that the orders therein complained of should be reversed as to the sums of 702*l.* 10*s.* and 1389*l.* 11*s.* 9*d.* *Lords Journ.* vol. 70.

Prec. Ch. xvii. p. 170.
 188. 3 P.

Wms.

401. (n.)

Vin. xi.

298. (bis)

1 Eq. ab.

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* * Note. In the last book the only point is, whether the book kept by Mr. and Lady *Ruffel*, (they being both dead) should be admitted to discharge as well as to charge them on the account before the Master.

Brownlow

{
1701.
}

Brownlow Sberard, Esq. and }
Dame Mary Anderson, his } Appellants.
Wife.

Simon Harcourt, Esq and Henry }
Harcourt and Richard Har- } Respondents.
court, his sons,

THE appellant stated: That Sir Richard Anderson, by will, written with his own hand, 25th July, 1699, devised all his real estate to appellant dame Mary (his relict) for life, and gave her all his personal estate and power to commit waste in felling woods; and made her sole executrix; and directed her to sell the inheritance of any of his lands to pay his debts: And that soon after Sir Richard's death, respondent Simon pretended he had a voluntary settlement, dated in March, 1694, whereby the real estate was limited to himself for life, with remainders to his sons Henry and Richard successively for life, and to their first and other sons in tail, and to give colour thereto, procured an advertisement to be printed in the news-papers, intimating that his house and study had been broken open, and his deeds cut in pieces and taken away, and only some scraps of them left; and offering a reward for discovery of the pretended offenders; and insinuating that such deeds were enrolled in the *King's Bench*; but that upon search made, it appeared no enrollment was ever duly made, but that respondent, being then and still a clerk in the Crown-office, had, with his own hand transcribed the pretended deeds upon two rolls of parchment, with a memorandum expressing, that they had been acknowledged in Court, and had procured them to be filed amongst the rolls in the Crown-office five years after the pretended acknowledgment, by affirming to the officer, that the mark which was to warrant the enrollment had been written by a third person; which afterwards, upon an examination in the *King's Bench*, appeared to be untrue, respondent confessing in open Court, that such mark was made with his own hand; and that for this ill practice, the lady was ready to move against respondent, and for vacating the present enrollment; and that to prevent this, respondent, unknown

1702.

known to her, applied to Mr. *Melbuen*, Lord Chancellor of *Ireland*, her father, who thereupon informed her, that respondent would refer all matters to him, and that she was to do the like, and inclosed to her in a letter a submission ready drawn, to execute and return to him, which she did, not doubting but she might safely confide in such a referee; but that before the parties were heard, or any witness examined on either side, her father sent for her to see him make his award; and that she attended, and found him filling up blanks in a paper, which he presently after executed as his award; and that she was at the same time made to sign a receipt upon the award, for part of the monies awarded, which was brought ready to be paid her; and that she was from thence immediately carried to *DeHors's Commons*, to renounce her executorship; and that she had then neither read the award nor heard it read; nor had ever before seen it or any draught or copy, nor was informed of its contents: And that in *April*, 1700, the referee sent her an answer, ready engrossed, to a bill of the respondent's, with verbal directions to put it in that day by noon, which she did; being made to believe she could not be safe without a decree, and that it was a proper answer; and that she intirely relied upon her father's doing her right, and did not see the bill till a year after, and that she could not obtain a copy of the award till three months after the answer was put in; and that appellants, in *April*, 1701, first heard that a decree was made against them, and on search discovered that *Harcourt's* bill recited, and tended to establish the award, which they found awarded nothing to the lady, save her jointure lands during life (about 300*l. per annum*, settled on her by Sir *Richard* after his marriage and before his will) and her own jewels, worth about 900*l.* and 1350*l.* in money, and that she was to convey to respondent and his heirs all her title to the rest of the real and personal estate; and that the award was not recited in her said answer, which expressed that she admitted such to be made as the bill set forth, and was willing to perform it so as she might be indemnified by a decree, and might enjoy her jointure lands, and be well secured against respondent's children and Sir *Richard's* creditors:—And that appellants further discovered that respondent had obtained a decree at the Rolls, 16th *May*, 1700, as upon a hearing on bill and answer, that the award should be confirmed, and that appellants

appellants should accordingly convey to Respondent, he giving security to indemnify them against Sir *Richard's* debts; and that appellants had no notice of the hearing, nor ever employed council or agent to appear or act for them; and that the Master therefore reported the decree irregular, but that such report was afterwards, 31st *October*, 1701, discharged by the Lord Keeper, as it appeared that a Mr. *Filmer* had taken upon him to act as their council in opening the answer; and that in truth respondent procured him to do so; and that a further irregularity was discovered at this examination, viz. that neither bill or answer was filed till after the decree; but that appellants not being proper to complain as to the answer, whilst the order of *May*, 1700, stood in their way, procured a re-hearing of the cause, and had leave to move at the same time to have the lady's answer amended; But that on hearing their petition in that behalf, the Court discharged the same, so that appellants could not make their defence, not having liberty to put the truth of their case in issue by a proper answer; and therefore the Court proceeded to rehear the cause upon bill and answer, 25th *April*, 1702, but made no material alteration in the former decree, save that the conveyance directed to be made by appellants to respondent is declared subject to the trust in Sir *Richard's* will, and that respondents two sons, so far as they were concerned, consented to appellants enjoyment of the jointure lands; and that by subsequent proceedings appellants were confined to an insufficient security for their indemnity; and tho' by the will the lady had power to sell what part she pleased of the real estate of 1600*l.* *per annum* for payment of the debts, and was to enjoy the residue during her life, yet by the award she was to be deprived of all the real estate, save her own jointure lands of 300*l.* *per annum*, and that no care was taken to make her a title thereto, or for vacating the enrollment of respondent's pretended settlement, which tended to defeat her and the creditors also: And appellants complained, that by the award the lady was to have nothing in lieu of the wood's, personal estate, jewels, and 1350*l.* and that respondent had no claim save by the enrollment of his pretended settlement, the validity whereof was never judicially tried; and insisted that the award and answer so imposed upon the lady, ought not to conclude appellants, who did not seek to alter the answer, as to any confession or denial

1702.

1702.

denial therein, but barely in that clause whereby she was made to say that she was willing to submit to, and perform the award, when it is plain she knew not what the award contained: And that there were many precedents in Chancery for giving liberty to amend answers, where it appeared there had been a surprize or ill practice: Wherefore appellants prayed that the decrees and proceedings might be reversed, and they redressed, in relation to the answer and award.

J. Pratt.

The respondent on the other hand shewed, that Sir *Richard Anderson* had one only daughter, *Elizabeth*, some time since deceased, who married respondent *Simon*, and by him had issue Respondents, *Henry* and *Richard*, and three daughters; and that Sir *Richard* being seized in fee of a considerable estate, subject to many debts and incumbrances, by deeds of lease and release, 25th and 26th *March*, 1694, settled the same, so as after his own life, and the life of respondent *Simon*, the same should go in remainder to the other respondents his grandsons, and duly acknowledged that settlement in the Court of *Queen's Bench* the next term after, in order to be enrolled; and it was enrolled accordingly; And afterwards, 4th *June*, 1699, being sixty-four years of age, and very infirm both in body and mind, was procured to marry appellant *Mary*, daughter of Lord Chancellor *Melbuen*, whom he had never seen till a few days before; and that though he had with her no fortune or estate, real or personal, yet she prevailed upon him soon after to raise 4000*l.* upon his estate, with part whereof he paid her debts, and she disposed of great part of the rest in buying jewels for herself worth 1500*l.* and otherwise as she thought fit; and that for this 4000*l.* the estate then stood mortgaged to Mr. Serjeant *Girdler*; and that in a short time after (his infirmities encreasing) she prevailed on him to settle 300*l.* *per annum* on her; and, as he grew still weaker, by divers artifices, prevailed on him to transcribe a will, which she had procured to be prepared in *London*, and sent to her into the country, under which she pretended to claim all his estate for her life, and a power to sell any part for the payment of his debts, and to sell and dispose of the timber and wood without account, and to have all his personal estate to her own use, and she was the sole executrix thereof; soon after which Sir *Richard* died, 16th

16th August, 1699; and that respondent *Simon*, on the first notice of Sir *Richard's* death, returned instantly from *Wales* to *London*, and in two days after took the settlement Sir *Richard* had made upon the respondents with him into the country, in order to take possession; but that appellant, Dame *Mary*, keeping it by force, respondent *Simon* publicly produced the settlement before many gentlemen in the neighbourhood, and all Sir *Richard's* tenants, to whom his hand-writing was very well known; and then returned with the settlement to *London*, and, by advice of council, brought ejectments, and also directed a caveat against proving the will, and that soon after this his house was broke open, his study, where his deeds were, rifled, the deeds destroyed and taken away with near 100*l.* in money, of all which respondent *Simon*, immediately made publick complaint upon oath; and instantly exhibited his bill against dame *Mary*, to discover the frauds in obtaining the pretended jointure and will, and to vindicate his own title to the premises: And that appellant *Mary* exhibited her cross bill, which he answered, and that afterwards upon mediation of friends, respondent being assured of the justice of his and his childrens title, was prevailed upon to refer the same to Mr. *Methuen*, the lady's own father, with whom respondent before that time had never any conversation or acquaintance, and mutual bonds of 10,000*l.* penalty were executed by appellant *Mary*, and respondent *Simon*, to perform his award: And Mr. *Methuen* having examined into all the circumstances, and being informed by appellant herself of the value of the real and personal estate and incumbrances, and having heard all parties, and fully satisfied himself therein, very solemnly and deliberately made his award, 22*February*, 1699, to the effect following; viz. That she should hold and enjoy those lands assigned to her for her jointure, but not without impeachment of waste, and all the rings and jewels bought by Sir *Richard*, and what she had before marriage; and that respondent, *Simon*, should pay her 1000*l.* on or before the 24th of that month, *February*; and that she should be allowed 350*l.* for debts she paid for Sir *Richard*, for servants wages, taxes, repairs, and housekeeping, to the date of the said award, and for the funeral expences of the said Sir *Richard*; and should thereupon renounce the executorship, and permit appellant *Simon* to take administration with the will annexed: And that this award

was

was openly read by Mr. *Metbuen*, in the presence of appellant *Mary* and respondent *Simon*, before it was executed; and was afterwards sealed and delivered in the presence of Sir *William Simpson*, her former husband's brother, Sir *Simon Harcourt*, the then Solicitor General, and Mr. *John Aſſe*, her near relation and friend; and that both parties being then satisfied with the award, indorsed their consent thereunto, and their desire that it might be confirmed by a decree in Chancery; to which endorsements each subscribed their name, and such subscriptions were attested by the same witnesses: and that respondent *Simon*, in pursuance and part performance of the award, then paid her the 1000*l.* and she gave a receipt for it on the back of the award; and respondent *Simon* soon after paid the remaining 350*l.* and that she, on her part, renounced the executorship to respondent *Simon*, who took out administration with the will annexed, for the use and benefit of his five children: And that about a fortnight after the execution of the award, appellant *Mary* was so well apprized of its purport, and so well satisfied therewith, that, in further performance thereof, she solemnly took leave of her acquaintance in the country, removed her goods, and delivered possession to respondent *Simon*; who, in order to have the award confirmed, exhibited his bill in Chancery; to which she, by the advice of her said father and council, put in a full answer upon oath, therein confessing the award, and her submission thereto; and a decree was by her, and her then present husband, *Sherrard's* consent thereupon regularly obtained and enrolled; and that appellants frivolously complaining of irregularity, it was declared by the Court, that the cause was duly brought to a hearing; but the enrollment was afterwards set aside, because it was mentioned therein to be made by the Master of the Rolls, whereas it ought to have been mentioned to have been made by the Lord Keeper of the Great Seal of England, according to the form of that Court, tho' the cause were heard by the Master of the Rolls: And the cause, upon the appellants petition, was re-heard by the Lord Keeper; who, after a long debate and deliberation, confirmed the former decree, with addition only, of ordering the respondent *Simon* to give security, strictly according to the award: And that this last decree was duly signed and enrolled, and that respondent *Simon* had given security

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security in obedience to the decree; himself in 14000*l.* and his sureties in 9000*l.* to indemnify appellants against all incumbrances, debts, and demands, relating to the real or personal estate of Sir *Richard Anderson*; and that appellant *Mary* should enjoy what she claimed as her jointure during her life, without molestation of respondents, or any claiming under them; and the Court declared the security sufficient; and that respondents, *Henry* and *Richard*, had signed the Register's book according to the Court's direction, thereby consenting that she should hold her jointure clear of them, or any claiming under them: And that though the award and decree had been fully performed on respondent's part, and in great part by appellant *Mary*, yet she still attempted to overthrow the award, not satisfied that in eleven weeks, which time only she had lived with the old gentleman, she had, in his weakness, procured a jointure of 300*l.* *per annum*, 1350*l.* in money, and jewels of the value of 1500*l.* besides what she got out of the 4000*l.* for which she made him mortgage his estate: And as to the fairness of making the award, respondents referred to the affidavits of *Mr. Methuen*, *Mr. Hatcher*, and *Mr. Andrews*, annexed to this appeal; and, that though respondents had followed appellants out of the way to justify themselves in many things not in issue in the cause, yet respondents insisted that the decree, founded on Dame *Mary's* own answer, could not be reversed, she not having therein complained of the award, or respondent's settlement, or of the pretended undue enrollment thereof, and therefore could not now enter into any of those complaints: And respondents submitted to the Lords, that if this decree should be reversed upon foreign suggestions, not mentioned in the bill or answer, it would be the first precedent of the kind, and many thousand similar decrees might with equal reason be reversed.

W. De-
byna.

Note. In the three affidavits referred by respondents, and subjoined to the foregoing appeal, it is sworn that appellant *Mary* before, and her husband, *Sherrard*, after their marriage, personally applied to, and employed *Mr. Filmer* to be their council on the hearing; and that the Lord Chancellor *Methuen* interfered on his daughter's part in the award, by her express direction and solicitation; and that appellant, *Sherrard*, had written

{ 1702. } written him, Mr. *Metbuen*, a letter, expressing that he, *Sherrard*, had signified to Mr. *Filmer* his consent to all his wife done in the matter.

1 Eq. Ab. *Die Luna*, 14^o Decembris, 1702. After hearing 29. pl. 5. council on this appeal, it was ADJUDGED that it 2 Vern. should be dismissed, and the decrees, orders, and proceedings of the Court of Chancery therein complained of, should be affirmed. *Lords Journ.* vol. xvii. p. 434. Vin. iv. 447. 190.

Richard

1702.

Richard Hyndmarsh and *Margaret* } Appellants.
his Wife, - - -

Mary Everard the Mother, and } Respondents.
Mary the Daughter, - - -

THE appellants stated, that *Daniel Collingwood*, being seized of the Manors of *Branton*, *Brandon*, and *Revely*, in the County of *Northumberland*, charged with 30*l.* *per annum* to *Lady Collingwood* for life, and 5*l.* *per annum* to *Mr. Collingwood* for life, he, 25th *June*, 1673, settled them upon himself in tail-male, and after on his brother *George* in like manner, and charged them with 1400*l.* for his sisters, *Margaret*, the appellant, and *Mary*'s portions: And if his said brother died without issue male, with 1100*l.* more to augment their portions: And that *Daniel* was also possessed of the *Holly Island*, worth 80*l.* *per annum*, under a lease from the Crown for thirty-one years, to commence from the 25th *March*, 1672, and died intestate without issue; and that thereupon his brother *George*, being his heir and administrator, entered into and enjoyed all the premises, and sold the manor of *Brandon* to *Mr. Aldgood*, and the manor of *Revely* to *Mr. Banner*: And afterwards, 17th *February*, 1689, to secure the lands so sold from incumbrances, and the payment of his sisters portions, as to the 1400*l.* only, with interest, by bargain and sale enrolled, conveyed the said manor of *Branton* to trustees for these purposes, and after in trust for himself and his heirs; and again, 4th *August*, 1691, by other deeds, charged the manor of *Branton* with the payment of several sums with interest, unto *Aldgood* and *Banner*, amounting in all to 187*l.* 10*s.* and, 7th of *June*, 1689, made his last will, and charged his estate with the payment of all his just debts, and devised the said manor of *Branton* to his said sisters *Margaret* and *Mary* in fee, they paying unto respondents *Mary*, the mother, 20*l.* yearly for life, and to *Mary* the daughter 30*l.* yearly for her education, till marriage or full age, and then 1000*l.* if she married one of his name and kindred, and gave the said lease of the *Holly Island* to his brother, *Colonel Collingwood*'s eldest son, he paying yearly out of it 5*l.* to *Mr. Humes*, and made

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his

his sisters executors, and, 12th November, 1691, died without issue; whereby his sisters additional portions of 1100*l.* became payable: And that *Mary* the sister died intestate about six months after, and thereby appellant *Margaret*, being her heir and administratrix, became intitled to her portion; and that respondent, *Mary* the mother, (who, appellants shewed, had been servant to *George*, and had lived scandalously with him) and the other respondent, exhibited their bill in the Exchequer against appellants, and some others of the testator's creditors, to enforce the payment of their yearly legacies of 20*l.* and 30*l.* and the arrears thereof, and to secure the 1000*l.* portion: And that appellants in their answer insisted, that the testator's said real estate ought to be applied to satisfy the debts and incumbrances wherewith it was charged in priority, together with all other testator's just debts, which amounted to above 500*l.* before respondents were let in for their legacies: And that the cause was heard 12th June, 1700, and appellants decreed to account with the respondents for testator's personal, and the profits of his real estate, and to pay the respondents 50*l.* or quit the possession to respondents, and that an account should be taken of the incumbrances, and of testator's debts: And that the Deputy Remembrancer, 7th July, 1701, reported, that the testator left no personal estate, save the lease of the island, worth 80*l.* and reported that appellants had received that, and the profits of the manor of *Branton*, 160*l. per annum*, from testator's death to 12th May, 1701, nine years and an half, and that, independent of the incumbrances on the estate and testator's debts, there remained in appellants hands 845*l.* 13*s.* 4*d.* and that there was due to respondents for arrears of their legacies 475*l.* and 121*l.* 10*s.* for interest, whereof appellants had paid 50*l.* in obedience to the decree; so that there rested only due to respondents 546*l.* 10*s.* which when paid would still leave in appellants hands 299*l.* 3*s.* 4*d.* towards payment of the debts and incumbrances, and that the manor of *Branton* was worth, to be sold, 3200*l.* and the *Holly Island* 480*l.* and that the Court, 27th October, and 10th November, 1701, confirmed the report as to all, save the 121*l.* 10*s.* interest; and decreed payment accordingly to respondents, and that appellants should in future pay respondents yearly the 20*l.* and 30*l.* legacies, out of the profits of the said estate, according to the will, and 100*l.* costs of suit; which

which report, order, and decree, appellants alleged were made *ex parte*, without hearing appellants, and that they had therefore frequently applied to the Court to have the cause re-heard upon the said report, and though they had paid the respondents 30*l.* more, could not obtain a re-hearing, unless upon the terms of paying the whole 475*l.* decreed, and that appellants were then in prison for not performing the decree, which they insisted ought to be reversed; because appellants ought not to have been decreed to account with respondents for the profits of testator's estate, but with his creditors; neither ought they to have been decreed to pay the 50*l.* until it had appeared that they had assets in their hands; and because there were upwards of 1500*l.* debts and incumbrances not taken notice of by the report, orders or decrees; and because the profits of testator's estate, found to be in appellants hands, were decreed to be paid towards satisfaction of respondents legacies, and not for discharge of testator's debts and incumbrances, in the first place, as they ought to have been; and because appellants were decreed to pay the growing yearly legacies of 20*l.* and 30*l.* to respondents, out of the profits of *Branton*, which appellants insisted ought first to be applied to discharge the incumbrances, and testator's just debts; and finally, because appellants were charged with the profits of the *Holly Island* for nine years and a half, amounting to 760*l.* as part of testator's personal estate in their hands, liable to satisfy respondents demands; whereas *Holly Island* was a specific legacy given to Colonel *Collingwood*'s son, and belonged to him, and respondents demands, and the testator's debts, were by express words charged upon the manor of *Branton*, which was reported sufficient to pay all; and that therefore the island, or the proceeds thereof, ought not to be so applied.

The respondents on their part shewed, that *George Collingwood*, (intending a provision for respondents, and to keep them from starving,) by his will gave the respondent *Mary*, the mother, an annuity of 20*l.* for her life, and to the other respondent 30*l.* *per annum*, until her age of twenty-one years, and therewith charged all his estate, of great value, and which had come to appellant *Margaret*, his sister; and that respondents could not after testator's death get one penny of their annuities,

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1702.

annuities, and were reduced to great necessities; and forced to lie upon the bare boards: And, in *Hillary*, 1694, brought there bill as paupers in the Exchequer, against appellants, and that appellants so delayed the cause, that it was six years before it could be heard, and in all this time, respondents obtained only 50*l.* upon security by order of the Court; and that an account was decreed to be taken of what was due to respondents for arrears, and that same should be paid out of Mr. *Collingwood's* estate, which was all declared subject and liable thereto; and that appellants declining to attend the accounts, the Court ordered the officer to proceed *ex parte*, unless appellants attended in a week; and that appellants then obtained a commission to examine returnable next term, when both sides attended several days, and the account was taken, and the officer reported as stated by appellants, and the cause standing to be heard upon the report, appellants desired to put it off, till *Michaelmas* term, which was ordered, on payment of 50*l.* in part of the arrears, but that no money was paid; and that the cause was heard 27th *October*, 1701, and the 425*l.* decreed to be paid, unless cause in a fortnight, and then the decree was made absolute; and appellants not paying the money, attachments, proclamations and commissions of rebellion were successively awarded against them: And that appellants, 23d *January* following, moved for a re-hearing; and the officer was ordered to state the proceedings; which he did: And appellants, 18th *May*, 1702, moved for a further hearing, and, by consent, appellants were to pay 105*l.* and bring 100*l.* into Court by the next term, and then to have liberty to except to the report; notwithstanding which no money was paid or brought into Court; but appellants, 21st *May*, moved for a commission to examine witnesses to prove a pretended debt, which was granted on paying 20*l.* down, in part of the 105*l.* but that no money was paid; but appellants had now brought the present appeal for further delay and difficulties to respondents, who were paupers in fact, and in form, and therefore insisted that this appeal ought to be dismissed with exemplary costs.

Samuel
Dodd.

Die Sabbati, 19^o *Decembris*, 1702. After hearing council on this appeal, it was adjudged by the lords that the same should be dismissed, and the decree, reports and orders

orders complained of affirmed, with 20*l.* costs against appellants. *Lords Journ.* vol. xvii. p. 197.

The house took notice that in the appellants printed case there were reflecting words against the respondents, and being informed that Mr. BENDLOWES had drawn the case, and ordered it to be printed, Mr. BENDLOWES was ordered to attend next day; and was then reprimanded by the Lord Keeper, according to the order of the house. *ib.* and 198.

1702.

John

1702.

John Prife, Esq. Eldest Son of Thomas Prife, Esq. by Mary Carne, } Appellant.
his Wife, - - - - - }

Thomas Button, Esq. Administrator } Respondent.
of *Diana* his late Wife, - - - }

Case 50.

THE appellant made this case: That respondent pretended his late wife *Diana*, appellant's half sister, was entitled to 3000*l.* portion, and 40*l.* a year maintenance, under a codicil, dated 7th *July*, 1684, annexed to the will of her grandmother, *Anne Prife*, charged upon freehold and copyhold lands in *Wisleton*, in the county of *Hereford*; and that respondent and his said wife had agreed to abate of the said demands, and accept from appellant 1000*l.* to be paid down, and 1500*l.* more in four years, and sixty pounds yearly interest, and afterwards full interest at 6*l. per cent.* And that appellant paid 810*l.* in part of the 1000*l.* and that it had been appellant's misfortune to make default at the hearing of this cause, and that thereby respondent, 12th *June*, 1702, obtained a decree, that the pretended agreement should be performed, and that appellant should pay 190*l.* residue of the 1000*l.* and should also pay the 1500*l.* with interest, and costs of suit; and in default thereof should account for the profits of the trust estate; and that the trustees should sell so much of the trust estate as would pay the same: And appellant stated, that he was a young, inexperienced gentleman, and was an hundred miles off all *June* and *July*, with several of his writings, and that his solicitor (one *Reeves*) persuaded him that he need not attend his cause untill *Michaelmas*' term; and that respondent's solicitor had expeditiously got the decree made absolute the 3d of *July*, and inrolled the 9th, within six days after; and that appellant came up on being informed of it, and applied twice to the Lord Keeper, that the cause might stand in the paper to be heard, and offered to pay respondent's costs; but that his Lordship adhering to his general rule, of not setting aside any enrollments of decrees, refused; so that appellant was without

without remedy, but by appeal; for he could not bring a bill of review, because his case depended on facts; and proofs not appearing in the decree, as respondent had enrolled it, and stated that he would not trouble the Lords with the merits of the cause, if the enrollment were opened, and the cause sent back into Chancery to be heard on the merits; and that he submitted to pay costs for his solicitor's neglect; but that respondent complained that appellant was guilty of great delays, in putting in four or five insufficient answers; whereas those answers were occasioned by the respondent's solicitor, who pressed appellant to discover the boundaries and value of all his freehold and copyhold land, which it was impossible for appellant, young as he was, to do to the satisfaction of a very nice solicitor, who got more by it than his client. And that appellant always offered to produce all his deeds, writings and copies; and to forward respondent in his cause, by consenting that publication should pass at *Michaelmas*, 1701; but that respondent insisted in his printed case, that appellant's cause ought not to be heard at all by the Lords; and that appellant could not read any of his proofs, because they had not been read in Chancery, which objection appellant insisted turned upon respondent himself, who was plaintiff in Chancery, and none of whose proofs had been read in Chancery; and that this objection was moreover contrary to the course of the Chancery, which in all cases of appeals, and re-hearings from decrees by default, heard causes upon the proofs and merits; and that it was against natural justice, that a man should lose his estate without being heard; and that in all cases brought before the Lords, the whole cause upon bill, answer, and proofs, stood open for their judgment, as if the same had never been heard; but if the Lords should not send back the cause to be re-heard in Chancery, appellant stated his case to be, that *Anne*, the grandmother, had no power to charge the freehold or copyhold lands, which the respondent called the trust estate (except copyholds of the yearly value of 40*l.* while *Diana* was living) with the said portion; for that the same had been settled in tail upon appellant for valuable consideration; and that appellant being just come of age, did not know of that settlement when respondent drew him into the agreement; but he now shewed the Lords, that previous to the marriage of his father, *Thomas Priſe*, with *Mary Carne*

1702.

Carne his mother, articles of agreement were entered into 16th *June*, 1669, by *John Prife*, his grandfather, and *Anne* his wife; whereby in consideration of the marriage and of 5000*l.* his mother's portion, it was agreed that all the estate at *Wistefson*, both freehold and copyhold, which *John* was seised of either in his own or in *Anne*'s right, should be settled to the use of *John* and *Anne* for their lives, only with remainder to *Thomas* their son, and *Mary* his intended wife, and the heirs male of the body of *Thomas* by *Mary*, with divers remainders over; and that *Thomas*, his father, by deeds of lease and release, dated 25th and 26th *August*, 1669, also executed previous to his said marriage, conveyed to *Thomas*, Earl of *Ossory*, and others, the manor of *Pryor's-court*, *Frome*, *Dormington*, and *Clarkson*, in the county of *Hereford*, and other his own estate to the use of himself for life, remainder to said *Mary* for her jointure, remainder to their first and other sons in tail, with divers remainders over: And that *John*, the grandfather, died in 1670, and *Anne*, his widow, whilst sole, and *Thomas* her son, by lease and release, dated 23d and 24th *September*, 1670, executed pursuant to those articles, settled *Anne*'s freehold estate to the uses in the articles; but inserted in that conveyance, that 40*l.* *per annum* should be paid to *Diana*, till 3000*l.* should be paid her: And appellant insisted that *Anne* had but an estate for life in that freehold estate, and had not power to charge it by her will, and that her copyhold lands were also bound by those articles; and that appellant as the oldest issue male of *Thomas* and *Mary*, was well entitled to those settled estates, discharged from that 3000*l.* and the 40*l.* a year: And stated, that about the end of the year 1694, a demand was made upon appellant by respondent, who had married *Diana*, and survived her, for the said 3000*l.* and that appellant being then but newly come of age, and not having his writings relating to the estate in his hands, (his father being alive) he, in ignorance of his title, and from respondent's persuading him that the lands were legally charged, and the respondent's demand on account of the 3000*l.* and 40*l.* annuity, amounting then to 3500*l.*: and his estate being greatly incumbered, he was seduced into an agreement to lessen the demand, and give 2500*l.* in full, viz. 1000*l.* to be paid presently, and 1500*l.* in four years after, but that this agreement was not reduced to writing; but that when the 1000*l.* was to be paid,

paid, appellant paid only 810*l.* for which he took respondent's receipt; which appellant insisted was no way binding; and that respondent had thereby made him believe there had been conveyances which charged the estate, but that appellant before he had paid more of the 2500*l.* had recovered his writings, and thereby discovered that his estate was not liable, and so refused to pay the residue: And insisted that it now appearing respondent had not any original right to charge the estate, appellant ought not, without any consideration, be bound by such pretended agreement, appellant being under the marriage settlement and articles a purchaser for a valuable consideration; and in answer to an objection of respondent's, that all appellant's estate at *Weston*, had come from *Anne*, the grandmother, appellant shewed that it had appeared in proof that his grandfather had purchased from *Bridgett Harford*, Esq. *Pidgeon-house*-farm, and other lands for 1000*l.* in 1633; and that *Anne*, the grandmother, had by her will given other parts of these lands, charged with 1200*l.* legacies, to her younger son, from whom appellant had purchased for 1600*l.* and that his grandfather had copyhold lands of his own there, which appellant enjoyed as his heir; and that appellant had other lands there of his own purchase, and rented others as tenant; and that as the decree was worded, all these might be called the trust estate, and appellant must account for the profits of all, and that the whole was liable to be sold towards paying respondent's 2500*l.*: Whereas appellant insisted no part ought to be subject, but only so much as the grandmother had power to charge; and that the decree, if not reversed altogether, ought at least to be rectified in that particular; and that appellant barely desired liberty to shew his case to the Court of Chancery as it really was.

W.
Dobson.

The respondent on the other hand shewed, that *Anne Prije*, the grandmother, had been seised in fee of certain freehold and customary lands in *Wissen* and elsewhere, worth about 300*l.* *per annum*; and that she, 12th July, 1687, surrendered the copyhold lands to *Thomas Prije*, deceased, appellant's father, and to respondent's late wife, *Diana*, and their heirs, to such purposes as she should direct: And by a deed, dated 2d April, 1688, declared the intent of the surrender

1702. { furrender to be to raise 3000*l.* portion, and an annuity of 40*l.* *per annum* for *Diana*, and to corroborate former securities for that purpose; and, by a codicil to her last will, devised all her freehold lands to *Masters* and *Westbaleing* (defendants in the cause) for 500 years, in trust for raising the portion and annuity of 40*l.* and died in 1689, and that appellant and his father had ever since been in possession of the trust lands, charged with the portion and annuity: And that respondent, in 1693, married *Diana*, and appellant soon after represented to respondent the insufficiency of his estate to pay the incumbrances upon it, and desired an abatement of his sister's portion; and that respondent, from brotherly affection, and to quiet all differences concerning what lands were liable to his wife's portion and what not, agreed to accept 2500*l.* in full for the 3000*l.* and to abate the arrears for the annuity, which were 500*l.* more, which appellant thankfully accepted, and agreed to pay 1000*l.* down, and the remaining 1500*l.* in four years after, with 60*l.* yearly for forbearance; and upon payment thereof, respondent agreed to surrender and assign all his right to the trust estate to appellant; and that appellant had, by letters under his own hand, acknowledged the agreement, and that it was very favourable to him, and repeatedly promised to stand to the same; and in pursuance thereof, in *December*, 1694, paid respondent 810*l.* in part; and that respondent and his wife had signed a receipt for 852*l.* 10*s.* 6*d.* which was the sum expected to be paid, and appellant had accepted of the said receipt, and therein the agreement was recited; and appellant at the same time gave a note under his hand, to re-deliver that receipt upon getting another for the 810*l.* and that appellant, after four years acquiescence, having declined to perfect the agreement, respondent and his wife, in *Easter* term, 1698, brought their bill to compel an execution thereof, or to have an account of the profits and a sale of the trust estate: And that appellant had put in five insufficient answers; and when they were reported insufficient, put in exceptions to the several reports, which were upon several arguments over-ruled by the late Lord Chancellor and Lord Keeper, and thereby for three years prevented a decree: And that *Thomas*, appellant's father, and said *Diana*, both died,

1702.

died, and respondent administered to his said wife, and revived the cause: And that appellant had by his answers confessed the agreement to be made at his request, and through kindness to him; but insisted that he had since found some old cancelled articles pretended to be made on his father's marriage, whereby the lands were so settled, that *Anne* had not power to charge the 3000*l.* on the estate, though respondent shewed that *Anne* was a *feme covert* at the execution of these articles: And shewed further, that after many affected delays on appellant's part, publication passed in *Michaelmas*, 1701, and that the cause was set down to be heard 4th *February* last; but on account of an arrear of causes, was ordered to stand early for the first cause day in *Trinity* term, which order had been served on the appellant's clerk 4th of *May*, and that appellant 1st of *June*, petitioned the Lord Keeper that the cause might stand adjourned till the latter end of that term; and respondent and appellant's council attending in Court 5th *June*, first day of *Trinity* term, the cause was ordered to stand first in the paper for 12th *June*, at which time appellant, by his council, promised to be ready; so that appellant had had about six weeks notice of hearing: And that the cause was accordingly called on to be heard 12th *June*, when appellant made default; and that it was thereupon decreed that appellant should pay 190*l.* the remainder of the 1000*l.* with interest, from the time of the agreement, and the remaining 1500*l.* with interest, at the rate of 6*l.* *per annum*, to the time that the same by the agreement was to be paid, and from that time 6*l.* *per cent.* interest, or in default the trust estate to be sold, and appellant to account for the profits, and the whole 3000*l.* and interest, with the arrears of the annuity, to be paid to respondent, unless cause by the return of a subpoena to be served; and which respondent shewed served 18th *June*, returnable 3d *July*, and that then on appellant's default, the decree was made absolute, and afterwards regularly signed and enrolled: And that appellant did not suggest that the agreement had been obtained by surprise, but that it was void by the statutes of frauds; which respondent insisted it was not, for that it had been recited in writing, and owned by the appellant under his hand, and

1702. and by several letters, and executed in part by payment of the 810*l.* and that the old cancelled articles and conveyances insisted on by appellant, to cover the freehold lands, were in his custody before he made the agreement, and never set up till after the bill filed; and that the grounds of the present appeal, were appellant's own ignorance, and his solicitor's idleness, which could be no reasons for the reversal of a decree before the Lords: And respondent insisted that appellant ought not to be suffered to take advantage of his own wilful defaults, and vexatious delays, nor be let in to make use of proofs before the Lords, which he neglected to produce in the Court below; and that it would tend to introduce a new and inconvenient practice if a party were suffered to decline the judgment of the Court below as to the merits of the *W. Cow-cause*, and bring the matter originally to be heard per. in the house of Lords.

Sim. Har- court,
W. Cow-
per.

Die Veneris, 18^o Decembris, 1702. After hearing council on this appeal, complaining that the decree was made *ex parte*, and without hearing appellant, and was signed and enrolled, and appellant precluded in Chancery, and praying that the decree might be reversed, or the cause sent back to be re-heard in Chancery, it was ADJUDGED by the Lords that the appeal should be dismissed, and the decree and orders complained of affirmed. *Lords Journ.* vol. xvii. p. 194.

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1702.
}

Samuel Shepberd, John Scarlett,
and *John Snell*, on behalf of
themselves and others, the
Judgment Creditors of *Richard Kent*, Esq. deceased,

} Appellants.

John Kent, Esq. and others, Executors of said *Richard Kent*,
John, Earl of *Kildare*, and
others,

} Respondents.

THE appellant stated the question in this case to be, *Case 51.*

whether an executor ought to pay judgment debts recovered against him on bonds, in priority to debts of simple contract, or debts by bond not reduced to judgment? And shewed, that *Richard Kent*, deceased, devised his real and personal estate to his executors for payment of his debts and legacies; and that *John*, Earl of *Kildare*, and his trustees, exhibited their bill in Chancery against the executors to be paid a debt of 8000*l.* alleged to be due upon a note under testator's hand, whereby he agreed to charge certain lands with the payment of that money, but which he had not charged therewith: And that the cause was heard 28th *June*, 1692, and the Court declared that the lands were well charged in equity by that note or agreement, and decreed accordingly, that all testator's freehold and copyhold estates specified in the note, should be forthwith sold to the best purchaser; and if the purchase money should not be sufficient to pay the 8000*l.* and interest, then the remainder to be paid out of the profits of the same lands from the time of exhibiting the Earl's bill, to the time of such sale; and that respondents, the executors, should account for the profits accordingly; and if these also were insufficient, then that the testator's personal estate should be applied to make up the deficiency, and that the executors should accordingly account for the personal estate: And it was further ordered, that all testator's creditors should come in and prove their debts, and receive satisfaction out of the personal, or produce of the real estate, according to the course of law in payment of debts by executors or administrators; and that appellants were bond creditors, and had recovered judgments thereon against

against respondents, the executors; and in *November*, 1695, exhibited their bill against the Earl, his trustees, and the executors, complaining that they were real creditors of *Richard Kent*, and no parties to the Earl's cause; and that that cause had been carried on by collusion with the executors, who never disclosed, but purposely concealed appellant's debts, which were of an higher nature than the Earl's debt; and that appellants ought to have had an opportunity of contesting the Earl's debt, and praying that the decree might be set aside, or that the Earl's debt might not have preference before their debts: And that their cause came to be heard 29th *June*, 1696; but the Court declared they would not alter the decree made in the Earl's cause, and dismissed appellant's bill so far as it sought to impeach the Earl's decree, or to let appellant's debts in upon the lands mentioned in the note before the Earl was satisfied: And it was further decreed, though not prayed by that bill, that respondents, the executors, should come to an account for their, testator's estate, having all just allowances made them; and that the Master report what appellants debts amounted to, and also to look into a debt claimed by respondent, *John Kent*; and if a just debt, that then *Kent* should retain of the testator's estate in his hands sufficient to satisfy the same, and also his costs, before any of the other creditors were paid; and decreed that appellants should appoint a person to get in the testator's estate, and that as got in, the same, as also what should be found remaining in the executor's hands after such deductions and allowances, should be applied towards payment of testator's debts, according to his will: And insisted, that appellants being creditors by judgments so recovered against the executors, the decree could not alter the legal course of payment of debts by executors, and that their judgment debts should be paid, at least out of the personal assets, in preference to any creditors by simple contract, or by bonds not reduced to judgments: And 8ool. of the personal estate being got in, appellants petitioned the Court that their judgment debts might be thereout paid in the first place: And that upon hearing that petition, 12th *July*, 1701, the bond and simple contract creditors insisted that the last decree had provided that all the debts should be paid according to the will, namely equally; and that the said decree could not be altered or controuled by any order to be made on the petition; and that

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that the Court was of that opinion, and gave appellants no relief: And that appellants thereupon applied to re-hear the cause, to the intent only to have the decree explained as to the course and priority of payment; and that the cause was re-heard 4th May, 1702, but the Court would not relieve appellants: And appellants insisted that, although the testator had by his will directed, which appellants contended he had not, that his personal estate should be applied to pay off all his creditors rateably, without respect to the nature of their debts, such direction would be void, as contrary to the rules of law and equity; and that the appellants were aggrieved by the decree, and that it ought to be reversed; but that appellants acquiesced under the Earl of Kildare's decree, but appealed from the decree, and all subsequent orders made in their cause.

H. Poley.

The respondent, *John Kent*, made this case: That *Richard Kent*, being greatly indebted, made his will 10th March, 1687, and Sir *Stephen Fox*, *Bridget Kent*, *Nicholas Fenn*, and respondent, executors; and devised to them his whole estate for two hundred years, to pay 500*l.* per annum to *Bridget* for her life for her jointure, remainder in tail-male to *John Kent*, his nephew, with remainders over; and devised to his executors all his real and personal estate for payment of his debts, funeral expences, and legacies, and declared that the term of two hundred years was upon trust; that if his personal estate should not be sufficient to pay his debts, funeral and other charges, that then his executors should raise the same with all their charges, by sale or mortgage of his real estate, and died in November, 1690; and that respondent, said *Bridget Kent*, and *Nicholas Fenn*, proved the will, and possessed themselves of as much of his personal estate as they could, and found it in great part desperate, and entered upon the real estate, which was all incumbered with great debts, and intended to perform the said testator's will; and that *John*, Earl of *Kildare*, and his trustees, in Trinity term, 1691, exhibited their bill, to compel the executors to pay the 8000*l.* and interest, as stated by appellants; and that in the same term *Johnson*, and others, exhibited their bill against respondent and others, for an account of testator's estates, and to have them fold for payment of their debts, according to the will: And that both causes were heard

heard in Chancery 28th *June*, 1692, when it was decreed as stated by appellants: And that respondent was bound for and with the said testator in several bonds to different persons in different sums, amounting to 6300*l.* and that testator was moreover indebted to respondent by bond 4000*l.* principal money, besides interest, making in all ten thousand three hundred pounds: And that in pursuance of the decree testator's estate, real and personal, had been sold to the best advantage; and that according to the established rights of law and equity, respondent had retained what was so due to himself; and that appellants had afterwards brought their bill, which bill was dismissed on the hearings, so far as it sought to affect Lord *Kildare's* decree, and that accounts were directed as stated by appellants: And that the estates had been sold, and the purchase money amounted to 13700*l.* of which 11272*l.* 11*s.* 2*d.* was paid to Lord *Kildare*; and that appellants, and other bond creditors, had agreed to divide 1550*l.* a particular part of the purchase money, among them; which was accordingly done, and paid them by the Master, under the direction of the Court; and there being a further sum of 800*l.* in the Master's hands, appellants petitioned the Lord Keeper that they might be paid their debts before the other bond creditors, as they had obtained judgments for the same, and that the other creditors insisted appellants ought not to have any preference, and that the Court affirmed the last decree on a re-hearing: And that the estate falling short to pay all the creditors, they differed about their priority; and appellants had now appealed from that decree, which however respondent insisted ought to be confirmed: And that by the rules of law and equity, he, as an executor, might retain out of his testator's estate, what he was bound for, and what was secured to him against any creditor of the same nature, with his costs: And that respondent was not principally concerned in the matter in controversy, which moved merely between the judgment and bond creditors, as to the point of preference in payment; and that the decree, so far as it related to respondent, could not be complained of.

W. Norris.

2 Vern.

435. Prec.

Ch. 190.

Eq. ab.

142.

Vin. xi.

306. xvi.

281.

Die Lune, 21^o *Decembris*, 1702. After hearing council upon this appeal, it was ADJUDGED that the same should be dismissed, and the decree and orders complained of affirmed. *Lords Journ.* vol. xvii. p. 198.

Anthony

1702.

Anthony Parker,

Appellant.

Humphry Burroughs and George Reynolds, } Respondents.

THE appellant stated, that by articles of marriage Case 52.
between appellant and his late wife, 22d June, 1688, it was agreed that her estate (except some leasehold interests in houses) should be at her own disposal by deed or will, notwithstanding the coverture; and that appellant being a member of the church of *England*, and his wife, and her trustees, Anabaptists, differences arose, occasioned, as he conceived, by some Anabaptists, and particularly respondent *Burroughs*; but that afterwards, by mediation of friends, they came to a second agreement, 3d July, 1691, to live and cohabit together or separately at their pleasures, and that she might dispose of her estate as she thought fit; and that in her last illness, a spotted fever, when she was *non compos mentis*, a will was pretended to be made by her, 6th October, 1699, whereby after a legacy of 100*l.* to *William Taylor*, her sister's son and next of kin, and other small legacies, she gave the rest of her estate to respondents, and named them executors, who were no wife related to her: And that respondents, upon her death, under colour of that will, possessed themselves of her estate when appellant was in the country, (and had no notice of her death) and privately proved the will in common form in the Consistory of *London*, of which, as soon as appellant had notice, he questioned the validity of the will; and after examination of several witnesses, Dr. *Newton*, the proper judge, upon a full hearing, pronounced sentence against the will, and granted administration to appellant: And that respondents appealed from that sentence, and afterwards proposed a reference, and artfully persuaded appellant to name Dr. *Titus Oates* for a referee, who was teacher of the congregation whereof respondent *Burroughs* was elder or deacon; and bonds of 4000*l.* penalty were executed next day, conditioned to perform the award: And that Dr. Oates, after several days hearing the parties and their witnesses, on the 26th of December, 1700, made his award, and confirmed the sentence against the pretended will, and awarded

appellant

Cases in Parliament.

appellant the leasehold estate, and 1500*l.* in lieu of the residue of his wife's estate, and mutual releases to be executed: And that respondents exhibited their bill in Chancery, to set aside the award, which appellant and Dr. *Oates* answered; and witnesses were examined on both sides, and the cause heard 17th November, 1702, before the Lord Keeper; who decreed that the award should be set aside, as unfairly made and obtained; but appellant insisted that respondents had not shewn any indirect practices on appellant's part, but appellant said, on the contrary, fully proved that respondents, their friends and relations, had, by evil practices, laboured to obtain an award in their favour, and had offered the Doctor great rewards, and solicited him "for the honour of God, for the sake of the gospel, and for the sake and interest of the Anabaptists;" and though it was said the Doctor had expressed some resentment against respondents, appellant insisted he ought not to suffer by any misunderstanding between respondents and the Doctor, who was an arbitrator of their own choosing; and the rather so, because it was proved that Doctor *Oates* had fully heard all respondents witnesses for several days, and that respondents, at the conclusion of each day, thanked the Doctor, and declared he had behaved himself fairly and impartially, and made no complaint of partiality until the award was made: And though it were objected, that the money awarded exceeded the estate, appellant contended respondents might have much more in their hands than what was awarded; and that the arbitrator was of that opinion, by awarding appellant to release respondents on payment of 1500*l.* and that it appeared in proof that the wife's estate was on appellant's marriage between 5 and 6000*l.* that appellant had lived but a little while with her, and received but 800*l.* thereof, and a few small houses, valued at 400*l.* and that she increased her estate during the separation, and recently before her death often declared she would make *Hannab Moreton* (a young girl her near relation, who died just before her) worth between 3 and 4000*l.* and that respondent *Burroughs*, had several hundred pounds of her money in his hands; and the *May* before she died, shewed two bonds under the respondent *Burroughs's* hand, one for 1500*l.* and one for 500*l.* and a note for 500*l.* more, and again shewed the same bonds about a month before she died: Wherefore appellant insisted that the decree ought to be reversed.

Sam.
Dodd.

The

1702.

The respondents, in affirmance of the decrees, shewed, that *Hester Moore*, who had been the widow of *Thomas Moore*, by a written agreement before her marriage with appellant, assigned her estate in trust for her separate use, and reserved to herself power to dispose thereof at her death, except the part agreed to be settled on appellant (which was very considerable) and thereupon the marriage was had; and that appellant afterwards used her very barbarously, and several suits had been commenced between them, but that they had come to a second agreement, by indenture dated 31st July, 1691, whereby, in consideration of 800*l.* more of *Hester's* estate paid to appellant, beyond what had before been settled upon him, her personal estate therein mentioned was assigned over in trust for such purposes only as she (whether sole or under coverture) should by any writing under her hand and seal, or her last will, or any writing purporting her last will, testified by two or more witnesses direct and appoint, and for want of such direction and appointment to her executors and administrators, so as that appellant, his executors, and administrators, might have no controul, disposition or power of, or over the ~~estate~~ or any part thereof: And that she, having a just aversion to appellant by reason of his barbarity, and having lived separate from him for a considerable time, did, pursuant to such her power, 6th October, 1699, when of sound mind, duly publish her last will in writing, which had been prepared according to her instructions by Mr. *Prime*, an attorney of known credit, in the presence of three credible witnesses; whereby she disposed of part of her estate, and made the respondents executors, as she had made the respondent *Burroughs* in other wills before drawn by Mr. *Prime*: And that respondents duly proved the will, and appellant questioned it in the Consistory Court of *London*; and that Dr. *Titus Oates*, who had been turned out from being preacher in the congregation of Anabaptists, had conceived a prejudice against respondents as instrumental to his being so turned out, and zealously solicited the cause against them, and that by his management a sentence was obtained against the will, from which sentence respondents had appealed to the Court of the Archbishops; After which, Dr. *Oates* contriving to be further revenged on respondents, and to draw them into his power, after the said sentence was passed, repeatedly insinuated to respondents that he was satisfied of

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of the justice of their cause from that clause in the second agreement, whereby appellant had debarred himself from having any thing to do with his wife's estate, and that if he had seen the settlement before, he would never have stirred a step for appellant; and that he was satisfied of the validity of the will; and that the instructions given to the attorney who drew it, were, in his judgment, a very good will; and pressed respondents friends to persuade them to refer the matter to him, declaring that otherwise they would spend the estate, and none be the better for it, but that damned crew of rogues in the commons, as he called them, who would get all, and that it grieved him to see such an effusion of christian money, in such an anti-christian court as that was; and by such insinuations prevailed on respondents to refer the matters to him, but on express condition that neither Mr. *Porter*, an attorney, appellant's agent, nor Mr. *Lovell*, appellant's proctor, nor a Mr. *Jeffrey*, should be present; for, that as they had left the law, they would have nothing to do with lawyers: And that respondents were by such contrivances drawn in to execute a bond of 4000*l.* penalty to stand to the Doctor's award: And that several attendances were had at Dr. *Oates's* house, where, contrary to the condition of the arbitration, *Porter*, *Lovell*, and *Jeffreys*, were all present; and that the Doctor abetted them in rude behaviour to respondents and their witnesses, whom the Doctor himself not only refused to hear, but palliated manifest contradictions of appellants witnesses, and at length, in vengeance to respondent, and from malice of mind, freely and indecently avowed, published his award under his hand and seal, whereby he not only confirmed the sentence against the will, but awarded respondents to pay 1500*l.* to appellant at his, Dr. *Oates's*, own house, though no part of the said *Hester's* estate had ever come to the hands of the respondent *Reynolds*, and very little to respondent *Burroughs*, to the utter ruin of respondents and their families: And that to be relieved against this award, respondents exhibited their bill, and appellant a cross bill, which were both answered: And to justify this extravagant award, the Doctor had sworn in his answer in Chancery, that the testatrix, a fortnight before she died, acquainted him that she had above 2000*l.* in respondent *Burroughs's* hands, and also that she had shewed him two several bonds under respondent *Burroughs's* hand and seal for 1500*l.* and the other for

500*l.*

300*l.* but respondent shewed that the Doctor had not insisted on, or pretended any thing of this at the time of the reference, nor till his answer in Chancery; and that respondent *Burroughs*, in his answer to appellant's cross bill, had denied that he ever entered into such bonds: And shewed that it had been proved in the cause that the testatrix had, about two years before her death, sworn before the commissioners upon an appeal for being assailed too much for her personal estate, that she was not worth above 300*l.* and that it appeared by the deposition of one of appellant's own witnesses, that she had declared she was 2000*l.* worse by her marriage with appellant: And that respondents had fully proved that Doctor *Oates* was angry with respondents, because, besides the matters before mentioned, they had neglected to invite him and his wife to the testatrix's funeral, and prevented his preaching her funeral sermon; and that he had declared he cared not which of the parties got the cause, so respondent *Burroughs* was ruined; and said "God had put a rod into his hands, wherewith he would scourge *Burroughs*; and that he would swinge him; and when he had wore it to the stump would lay it by; and that respondent *Burroughs* was a rogue, and before he had done with him he would ruin him, and make him fly the country, and not leave him worth a shilling; and had said, "do you think that weaver's boy (meaning the respondent *Burroughs*) shall knock heads with me, who have been a Doctor of Divinity above these twenty years?" And being told he ought not to seek for revenge, but leave it to God; *Oates* replied, "God was many times long before he did it; and that when the Jews refused St. *Paul*, he turned to the Gentiles." And it being replied to him, that though St. *Paul* did turn to the Gentiles, he did not wage war with the Jews; *Oats* rejoined, "that though *Paul*'s teeth were grown, his nails were not." And that *Oats* had further declared, that respondents deserved to lose the cause, because they brought it into that cursed *Babylonish* Court of Doctors Commons, which, he said, was nothing but a damned relief of popery: And that upon bearing the cause, the Lord Keeper, upon reading the said several deeds and proofs, and the conviction of perjury of Doctor *Oates*, declared that neither the reference or award were fairly or indifferently obtained; and that the award appeared to be made revengefully and partially, and therefore decreed the

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the award be set aside, and the award bond to be cancelled, and appellant to acknowledge satisfaction on the record of the judgment obtained thereupon; and the security formerly given by respondents to the sheriffs of London and *Middlesex*, upon a *ne exeat regno* being sued out against them, to be vacated and discharged: Which decree respondents insisted was just and reasonable, and ought to be affirmed; and the rather, because appellant had the sentence with him, if it could be supported, in the Ecclesiastical Court; whereas if the award should stand, respondents had no remedy at law or elsewhere.

Thomas
Powis.
William
Cowper.

Die Jovis, 28^o Januarii, 1702. After hearing council upon this appeal, it was ADJUDGED that the same should be dismissed, and the decree complained of affirmed; and that appellant should pay respondents 20*l.* costs of defending the appeal. *Lords Journ.* vol. xvii. p. 261.

✱ *The editor hath been more circumstantial in the foregoing report than usual, because this being a private case, long after all plot businesses were cool and laughed at, shews the true mind of the famous Titus Oates, about which some historians seem to entertain doubts.*

William

William Peirson, Esq. - - Appellant.

Thomas Miles, and William Miles, Respondents.

THE appellant stated, that he was and had Case 53. for many years been seised in fee of the castle and manor of *Stokesley*, with the appurtenances, in the county of *York*, belonging antiently to the family of the *Baliols*, after to Lord *Eure*, and after to Sir *Richard Egger*; held formerly from the Crown under the annual rent of 13*s.* 4*d.* and now from Sir *Henry Harwood*, Baronet, patentee of the crown, under the same rent; and that, time out of mind, there had been an antient water corn-mill, and also an antient horse-mill at the west end of the town of *Stokesley*, within, and part of the manor, whereat all the tenants, freeholders and inhabitants of the town of *Stokesley*, did use and ought to grind all their corn, grain, and malt, consumed in their houses, allowing the sixteenth dish, or other reasonable roll or moulture: And that *Stokesley* was a market town, and that the water which drove the mill ran through the town from east to west; and that the mill-dams frequently stopping the water below the town, occasioned such inundations and floods in the town, that the people could not live in the lower rooms, and those who had not upper chambers were forced to quit their houses: And that the inhabitants, to prevent such mischief from the floods, requested Sir *Richard Egger*, then lord of the manor, to remove the antient mills to a more convenient place; and he, for their ease and benefit, at his private expence of 15*ol.* removed his antient mills from below the town, and built other mills above the town, and pulling down the old dams, gave free passage to the water, so that the town was now seldom flooded: And that instead of the antient water-mill and horse-mill, he had built two water-mills under one roof; and that appellant, since he purchased the manor, had built a horse-mill under the same roof for grinding malt, and had kept the other mills in good order for grinding corn, and that they were sufficient

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ent to serve the town: And that respondents had set up a hand-mill within the town, in which they ground malt for themselves and others, which was consumed in the town, and also ground their corn at other mills: And that appellant exhibited his bill in the Exchequer against respondents, to have his suit of mills continued and established: And 7th *July* last, the cause was heard before the Lord Chief Baron *Ward*, Barons *Bury* and *Priest*; and that appellant had proved by many witnesses, freeholders or inhabitants of *Stokesley*, who, as such, swore against themselves the prescription for all the inhabitants to grind at the antient mills, and that they had been removed at the request of the inhabitants, and for their ease and benefit, and that they still reaped the benefit of that removal: And that Mr Baron *Priest* was of opinion appellant ought to be relieved, and defendants decreed to grind at the new mills; but the other two Barons held, that by the removal of the mills, the prescription was destroyed in law, and that they could not relieve it in equity; and for that reason dismissed the bill; and though appellant must thereby lose his suit of mills, also ordered him to pay respondents costs; and appellant complained he was aggrieved by the decree, and insisted it ought to be reversed, because the antient usage and prescription had been proved by a multitude of witnesses; and also that the antient mills were removed at the request and for the benefit of the inhabitants; and that therefore, although in strictness of law, the suit and service to the antient mills were destroyed, yet a Court of Equity ought not to permit them to take advantage thereof, but ought to decree them to perform the same suit and service to these mills as of right belonged to the antient mills: And that it was also proved in the cause, that ever since the removing the antient mills, the inhabitants had generally used to grind at the new mills, and that if any person set up any mills, the lord of the manor, when he discovered it, either broke such mills, or compelled the owners to pull them down, or forbear using them; and that foreign millers were frequently disturbed when they came to fetch corn out of the said town to grind: And appellant insisted that such general usage was a presumption and evidence, that there was an agreement by the inhabitants to continue their services to such new mills; and that the inhabitants ought to be decreed to perform such agreement:

ment: And that though the Court had not thought fit to relieve appellants, yet under these circumstances there appeared no reason to decree costs against him.

1702.

Con.
Phipps.

The respondents on the other hand shewed, that they had in their answer denied the ancient suit and new agreement, and that issue being joined upon all matters in variance, they were necessitated at a very heavy expence to examine witnesses to every matter in issue: And that the cause was heard at Serjeant's-inn after *Trinity* term, 1702, and that appellants then waved all matters, save the suit of mill, and his claim, that the tenants and inhabitants should bake every thing bakeable consumed within *Stokeley* at his bakehouse there; and that on a full hearing, and after great deliberation, the bill was dismissed as to the whole; and this decree of dismissal respondent insisted ought to be affirmed, because it appeared on appellants' own shewing that the suit to the former mill, if admitted due by prescription (which yet was not sufficiently proved) was by the demolishing of it, and new erection at a great distance, intirely destroyed; and because there was no proof of any time when the supposed agreement, touching demolishing the old, and erecting of the new mills was made; and that a Court of Equity ought not to execute and establish an agreement not produced nor ascertained: And that there appeared no reason to presume any such agreement ever made, inasmuch as at and about the time appellants aimed to assign the new erection of the present mills, and ever since the tenants and inhabitants had ground at pleasure at several adjacent mills, and erected and used private ones in the town; and that the carriers or loaders of the adjacent mills came twice or thrice a week, or oftener, in the day time, to fetch the grist from the tenants and inhabitants without opposition: And that the presumption was against such ancient mill, because *Stokeley* was a large market town of great resort, and the appellants himself stated that there was but one old mill, and it could not be reasonably imagined that all the tenants and inhabitants were immemorably bound to do suit at that mill, which could not serve a fourth part of them: And

1702.

Wm.

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And finally, that the consideration alleged for the supposed agreement wholly failed, since it was fully in proof that the town was still liable to inundation as before, and that the removal of the former mill was for the owner's private convenience, as the former situation was more exposed to the impetuosity of the river than the new one, and required more timber and materials, and more frequent and expensive repairs.

Die Sabbati, 20^o Februarii, 1702. After hearing council on this appeal, it was ADJUDGED that the same should be dismissed, and the decree and dismissal complained of affirmed. *Lords Journ. vol. xvii. p. 299.*

St. John

Sir John Ivey, Esq.

Appellant.

Edward Asbe, Esq.

Respondent.

THE appellant stated that he, about *April*, 1696, *Case 54.* was designedly introduced to respondent, who was then a captain of a company in a marine regiment commanded by the Marquis of *Carmarthen*, and was, through surprise, prevailed on to sign articles; that respondent should, on or before *Midsummer-day* then next, procure for appellant a commission to be captain of the respondent's company, and appellant to pay respondent 600*l.* consideration; and gave a bond of 1200*l.* penalty for performance, and a warrant of attorney to confess judgment thereon, and that both were deposited in the hands of a Mr. *Milburne*, deceased, as escrows, not to be delivered until such commission procured: And that appellant staid in town until after *Midsummer-day*, and the commission not being then procured, retired into the country; but that about *Michaelmas* following he received a letter from respondent, acquainting him that he had procured the commission; whereupon appellant some time after came to town, and found that the commission had been disposed of to another person; and that respondent had notwithstanding procured the warrant of attorney from *Milburne*, and had judgment entered up against appellant for 1200*l.* and threatened to sue execution against him; and that appellant was advised that the agreement was not only void, for fraud and surprise, but was absolutely repugnant to several ancient and modern statutes, and particularly to a statute made in the 5th and 6th years of King *Edward the Sixth*, and another made 6th and 7th King *William the Third*, against buying and selling of offices in the army; which obliged the person coming in to make oath that he neither, directly or indirectly, paid, or caused to be paid, or promised to pay any sum of money or gratuity whatsoever, for the commission; and that thereby appellant could not pursue the agreement, or accept, or act under the commission, without being guilty of wilful perjury, which respondent knew at the time of the agreement; though appellant, who was then a stranger to the constitution

1702.

tion of the army did not : And that appellant, in *Michaelmas*, 1698, exhibited his bill in Chancery against respondent to have the articles set aside, and the bond and warrant of attorney delivered up, and the judgment discharged : And that the cause came to be heard 16th *June* last ; and it not fully appearing, as alleged, whether marine regiments were included, or to be construed within the words of the statute of *William*, the Lord Keeper declared he could not relieve appellant, and dismissed his bill as to any relief, save only against the penalty of the judgment : Which decree appellant insisted ought to be reversed ; because it was utterly impossible by the laws then, and yet in force, for appellant to have the benefit of the agreement on his part ; and that he declined taking out the commission to avoid wilful perjury ; and that as he neither had, nor could have the benefit of the agreement on his part, there was no reason respondent should have so great a sum from him for nothing ; and that it might be of dangerous consequences to the nation, and a fatal discouragement to the officers of the army, to countenance the buying of military commissions, and thereby prevent gradual advancement,

John
Squibb.

The respondent on the other hand stated, that he had been many years before 1696 a captain in the first regiment of marines, and growing aged, and very infirm, had thoughts of quitting the service, and that appellant knew this, and frequently, by himself and his agents, solicited respondent to procure him to be a captain in that regiment ; and that thereupon the agreement and bond, stated by appellant, were entered into ; and that the bond and warrant were, by mutual consent, deposited in the hands of *Milburne* ; and that respondent signed a writing to appellant declaring the purpose : And that respondent accordingly procured a commission to be signed by his late Majesty King *William* for appellant in respondent's room, dated at *Gemblours* in *Flanders*, 3d *July*, 96, and on its being returned into the Duke of *Shrewsbury*'s office, (then one of the principal secretaries of state) respondent gave appellant notice that the commission lay there ready for him ; and that after this, and not before, the bond and warrant of attorney were delivered to respondent by *Milburne* ; but that appellant thought fit to disappear, and

and neglected to take out his commission, or perform his duty required by the said commission; and that thereupon it was some months after granted to one *Bradbury*, a lieutenant in the same company: And that after appellant had made respondent lose his employment, instead of paying the 600*l.* he brought his bill in Chancery to be relieved against the agreement, untruly pretending he was overcome with wine, and not in his senses when the bond and articles were executed; and that although he found himself tricked into a very foolish agreement, yet he was resolved quietly to undergo the punishment of his folly, if respondent would have performed his part of the agreement, and pretended he had not so done; and contended that offices in the army were not saleable: And that appellant had made no proof of his pretended equity, but that respondent had fully proved the agreement, and that he had performed all required of him; and that the Court was of opinion on the hearing, that appellant ought not to be relieved any further than against the penalty of the bond and judgment, and therefore decreed appellant to pay respondent the principal and interest due upon the bond upon service of the decree; and that in case appellant paid the money upon service of the order, he was to be excused from costs, but in default thereof was to pay respondent his costs: Which decree respondent insisted was just and equitable, and ought to be affirmed.

Henry
Poley.

Die Sabbati, 20^o Februarii, 1702. After hearing *Præc. Ch.* council upon this appeal, it was ADJUDGED by the 199. Lords that the same should be dismissed, and the order *Vin. iv.* and decree complained of affirmed.—*Lords Journ.* vol. 406. xvi. xvii. p 298. 129.

Thomas,

1702.

Thomas, Lord Wharton, - - Appellant.

Robert Squire, Esq. - - Respondent.

Case 55. **T**HE appeal was from the following order of the Court of Exchequer, dated 15th July, 1701.

“ *Ebor*: WHEREAS on the 26th of February last,
 “ upon motion on the part of *Thomas, Lord Wharton*,
 “ it was ordered by the Court, that a commission issued
 “ out of this Court in the 15th year of the reign of
 “ King *James* the first, together with six several arti-
 “ cles of instruction, and eight several schedules
 “ thereto annexed, purporting a boundary and survey
 “ of the honour of *Richmond*, and the lordship of
 “ *Middlebam*, in the county of *York*, taken by virtue
 “ of said commission by Sir *Timothy Hutton*, and Sir
 “ *Talbot Bowers*, Knights, and other commissioners,
 “ and dated at *Richmond* 19th October, 1618, should
 “ be left in the hands of Mr. *Thomson*, one of the at-
 “ tornies, but should not be received as a record, or
 “ filed, nor any use made thereof, or of the inrollment
 “ thereof, until further order; now, on motion of
 “ Mr. *Turner*, on behalf of Sir *William Robinson*,
 “ Baronet, and others, praying that the said order
 “ might be set aside, and that the said commission, arti-
 “ cles, and survey, might be allowed of as a record,
 “ and filed accordingly: For that it appeared by an
 “ endorsement, written in the hand of the Court on
 “ the outside of the last of said schedules, that the
 “ same were delivered into this Court 28th No-
 “ vember, in the 16th year of the reign of King
 “ *James*, by the hands of *Roger Kenion*, Gent. one of
 “ the commissioners in the said commission named,
 “ and that the said commission survey likewise ap-
 “ peared to have been returned and filed in this
 “ Court, for that in an order or decree made 18th June,
 “ 19. *Jac.* touching the tenants of the honour of
 “ *Richmond* and lordship of *Middlebam*, it was recited
 “ that upon survey made in June, July, August, Sep-
 “ tember, and October, 1618, by Sir *Timothy Hutton*
 “ and Sir *Talbot Bowers*, Knights, and other commis-
 “ sioners certified, into this Court, and there remain-
 “ ing

" ing of record : And it appeared that there had been
 " improved of and from the moors and wastes of the
 " manors of *Richmond* and *Middleham*, several great
 " parcels of ground, and other parcels were intended
 " and desired to be improved, which improvements
 " are particularly recited in the said order or decree,
 " and are the same that are mentioned in the said sur-
 " vey now in question, and after the recital of the said
 " improvements in the said order or decree, it is there-
 " in mentioned in these words, (*viz.*) as by the said
 " certificate, bearing date at *Richmond* the 19th day
 " of *October*, 1618, relation being thereunto had may
 " more fully appear; and the Court was also inform-
 " ed, that in the book of inrollments of surveys and
 " other matters, of the reign of the said King *James*,
 " (No. 21) remaining with the auditor of the county
 " of *York*, the said articles of instruction and survey
 " contained in the said eight schedules annexed to the
 " said commission, were entered and inrolled, together
 " with these words writ in the said book of inrollments,
 " immediately before the said entry of the said articles
 " and survey, *viz.* *Inter Inquest' & Extent, de*
 " *anno 16^o Regis Jacobi in Scaccio remanen' ac in Custod'*
 " *Remem' Regis existen' inter al' continenter ut sequi-*
 " *tur* : And the Court was likewise informed that
 " the said commission, articles of instruction, and
 " survey, were copied in or about the year, 1674, by
 " the said Mr. *Thomson* for his master, *Hugh Frank-*
 " *land*, Gent. deceased, late one of the attornies of
 " this Court; and that it also appeared amongst other
 " things, by the affidavit of *Mathias Hawkins*, Gent.
 " formerly clerk to Mr. *Watts*, one of the attornies
 " of this Court, now read in Court, that two or three
 " years after the year 1671, he had sent the said com-
 " mission, articles of instruction, and survey, now in
 " question, as he was well satisfied, and in his con-
 " science did believe, upon the proper title of special
 " commissions and inquisitions, in the 16th year of
 " the reign of the said King *James* the first, in the
 " innermost room of the King's Remembrancer's-office
 " at *Westminster*, and that the said Mr. *Hawkins* did
 " then shew the same on the said title to *Humphrey*
 " *Wharton*, Esq. and *Peter Atkinson*, Gent. and that
 " when he saw the said commission and survey on the
 " file, there was not any map annexed or filed with
 " the same, as he did assuredly believe, and the said
 " Mr.

“ Mr. *Turner* also informed the Court, that the said
 “ commission, articles of instruction, and schedules,
 “ were unexpectedly found by *John Rudd*, Gent.
 “ late Clerk to *Ralph Grainge*, Esq. deceased, who was
 “ formerly concerned as solicitor for *John How*,
 “ Esq. in one or more trials at bar of this Court,
 “ concerning some lead-mines in the said lordship
 “ of *Middleham*, in which trials the said commission,
 “ articles, and survey, were, as was alleged, used as
 “ evidence about two days after the 29th day of
 “ *August* last at *Stockton*, in the county of *Durham*,
 “ in the presence of Alderman *Atkinson* of *Stockton*
 “ aforesaid, and others amongst a bundle of papers
 “ belonging to the said Mr. *Grainge* in his life time,
 “ which bundle of papers, amongst other papers of
 “ the said Mr. *Grainge*, were, by the permission of
 “ the late Lord Chief Justice *Treby*, given to the
 “ said Mr. *Rudd*, and were by *Richard Bellasyse* sent
 “ unaltered to the said Mr. *Rudd* at *Stockton* aforesaid;
 “ and that the said commission, articles, and survey,
 “ contained in the said eight schedules, were all that
 “ the said Mr. *Rudd* then found relating to the said
 “ survey, and were tacked together when the said Mr.
 “ *Rudd* found the same, and that there was no map,
 “ nor schedule or schedules of depositions, annexed
 “ thereto when the same were so found by the said
 “ Mr. *Rudd*; and that the said Mr. *Rudd* on or about the
 “ 12th day of *October* last, in the presence of *John Com-*
 “ *mins*, Gent. and others, did seal up and deliver the said
 “ commission, articles, and survey, in the same plight
 “ and condition exactly, and as whole and entire
 “ as the said Mr. *Rudd* found the same, without
 “ diminution or alteration whatsoever, to *George Bower*,
 “ Esq. to deliver the same to the said Mr. *Thomson*,
 “ in order to have the same put into its proper place:
 “ And that the said commission, articles, and survey, as
 “ the same were delivered to the same Mr. *Bower*,
 “ were afterwards, in the said month of *October* last,
 “ delivered by the said Mr. *Bower* sealed up to the said
 “ Mr. *Thomson*, at the *Exchequer* office in the inner
 “ temple; all which as to the finding of the said com-
 “ mission and survey by the said Mr. *Rudd*, and the
 “ sending thereof to the said Mr. *Thomson*, appeared
 “ by the affidavits of *Bellasyse*, *Rudd*, *Atkinson*, and
 “ *Commins*, now read in Court; whereupon, and upon
 “ hearing Mr. *Cooper*, one of his Majesty's Council
 “ learned

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“ learned in law, and Mr. Phipps, on the behalf of
 “ the said Sir William Robinson and others, and upon
 “ the examination of the said Mr. Thompson, touching
 “ the said commission and survey, and the copy or
 “ copies thereof made by him as aforesaid; and upon
 “ reading the said order of the 26th of *February* last,
 “ and the said order or decree of this Court, made
 “ the 18th day of *June*, in the 19th year of the reign
 “ of the late King *James*, the first, the said entry
 “ or inrollment in the auditor’s book, and also
 “ of the affidavits of *John Todd*, Gent. and of
 “ *Robert Squire*, Gent. and upon hearing Sir *John*
 “ *Hawles*, Knight, his Majesty’s Solicitor General,
 “ Mr. *Ettrick*, Mr. *Dodd*, Mr. *Slone*, and Mr.
 “ *Chebbire*, on the behalf of the said Lord *Wharton*,
 “ opposing the filing of the said commission and survey:
 “ And upon view and perusal of the said commission,
 “ articles, and survey, and on long debate of the
 “ matter the Court *Seriatim*, delivering their opinions
 “ touching the same, it is thereupon this day ordered
 “ by the Court, that the said order of the 26th of
 “ *February* be, and is hereby set aside; and that the
 “ said commission, articles, and schedules, purporting
 “ the survey as aforesaid, be allowed as a record of
 “ this Court, and filed accordingly on the proper file,
 “ (to wit.) amongst the inquisitions and extents of the
 “ sixteenth year of the Reign of the said King *James*
 “ the first; but the inrollment thereof, prepared by
 “ the said Mr. *Thompson*, is hereby set aside; and the
 “ entry of the said inrollment, on the said com-
 “ mission and schedules, is to be obliterated.”

And in support of this appeal appellant stated, that
 he had a cause depending in Chancery, about the
 boundaries of certain lands in the mines of *Yorkshire*,
 in which cause respondent was a defendant; and find-
 ing by respondent’s answer and cross bill in Chancery,
 that a pretended survey of the honour of *Richmond* and
 lordship of *Middleham*, was much relied on by respon-
 dent, appellant caused diligent search to be made in all
 the offices of record, but could not then find any
 such: And that appellant had afterwards discovered,
 that about *Michaelmas* term, 1700, the pretended survey
 had by respondent’s contrivance, whilst the said cause
 was depending, been privately brought out of *Yorkshire*,
 and delivered to one *Thompson*, an attorney in the

T

Exchequer,

1702.

Exchequer, an agent for respondent, with design that *Thompson* should secretly file the same, with intent to make use thereof when upon record as evidence in that cause; and that *Thompson* had, without any warrant, taken upon him to receive it as an officer, and to keep it for some time privately, and had also clandestinely made and prepared an inrollment thereof, which appellant had likewise discovered, and thereupon applied to the Court of Exchequer; and that the Court of Exchequer thereupon, 20th *February*, 1700, made an order to suspend the filing it; and afterwards, on respondent's application, made the order of the 15th *July*, 1701, by which last final order appellant conceived himself aggrieved, and insisted it ought to be set aside and discharged, and that the pretended survey, or parchment writing, should be ordered to be put into the same state and condition wherein it was when the said suits were commenced; because it was not denied that it had been for 28 years out of the Court, and out of the custody of any sworn officer; nor was there any order of Court for taking out the same, nor any manner of account given by whom it was taken off the file, nor where it had been from that time until it was pretended to be found amongst the papers of *Grange* after his decease, who had died about five years past; and that from that time, instead of being immediately transmitted into the office, it appeared to have been privately kept by respondent's agents for some years, and endeavoured to be privately filed, without the knowledge or order of the Court: And that it was now manifestly imperfect, and that some schedules had been taken from it; and that there were no verdicts, depositions, plots, or maps, now remaining therewith, all which were required by the commission, and by the certificate and return appeared to have been taken, and were referred to for the explanation thereof, the commissioners in their return referring to several schedules as annexed thereto, and though to answer in appearance the words of the return, the certificate was now divided into eight several pieces, or presses, each figured or numbered at the top, yet that it appeared by the stitches at the top and bottom of each press, that they had been originally all sewed together as one long schedule; and that *Thompson* owned that he or his master set the said figures thereon: And that it appeared by several holes in the parchment where it was now tied, that it had been often untied; and that the office book wherein the account would have

have appeared of the true number of schedules originally returned therewith, had been taken away, though the other books of the office, both before and since that time, were all extant: And that *Thompson*, who pretended to prove he had made a copy about the same time, to be given in evidence upon a trial at *York*, and to remember it by the circumstance of one *Jobson* riding post therewith to *York*, could give no reason why he believed there were no more schedules then annexed to it. And that it appeared by *Jobson*'s own letter, that he, *Jobson*, was in *London* during the trial at *York* aforesaid, when he was pretended to have ridden post: And appellant stated that he had purchased the mines in question before his pretended record was brought into the office; and that if such writing should be suffered to be filed as a record after such length of time, the searching the record office, which was the common security of every subject, would signify nothing, all settlements and purchases would be easily defeated, and no man could be safe in his estate or inheritance. And appellant shewed, that the other defendants in Chancery were not made parties to this appeal, because the respondent *Squire*, was the only defendant who made affidavits for the supporting the survey, and the principal person that solicited therein, and employed *Thompson* to file and enrol it; and whereas it was objected that others might be concerned in this pretended record who ought to be heard, appellant answered, that if it were not a good and perfect record, it ought not to be evidence for any, and that the mischief in establishing it would be more dangerous on the other side.

J. Powis
Sim.
Harcourt,

The respondent on the other hand shewed, that this record had been made use of on a trial at bar some years ago, and was by mistake (among several other writings and papers then also made use of) carried to Mr. *Grange*'s chamber in the Temple, and had been found since his death, and delivered back into the Exchequer to be put on the proper file: But that appellant finding that this record might affect him in a difference he then had with Sir *William Robinson*, and Mr. *Bathurst*, Colonel *Byerly*, respondent, and others, touching certain lead-mines, thought fit to move the Court of Exchequer to have it suppressed: And that that Court thereupon examined the matter, and in the mean time stayed the filing; and after four months time, upon full examination of all persons who knew

1702.

knew any thing concerning the record, and upon inspection thereof, and comparing it with entries in divers books concerning it, 15th July, 1701, made the order complained of, being satisfied it was in the same plight as when taken off the file, and had not been altered or defaced: And that appellant had since acquiesced, but that record having been made use of, and allowed as evidence in *Michelmars* term last, at a trial at bar in the *Queen's* bench, and a verdict being given against appellant upon full evidence, and a view previously had, Lord *Wharton* had now appealed from that order, to deprive the parties (defendants to the suit in the *Queen's* bench) of part of their evidence, and therein named *Squire* and *Thompson* (a sworn clerk of the Exchequer) for parties, because *Squire* was a defendant in a cause appellant had depending in Chancery about certain lead-mines; and that they, *Squire* and *Thompson*, were advised that this petition was not properly an appeal, but an original complaint against them, or rather against the Court of Exchequer, for a matter relating to the safe custody of the records of that Court, and about which no suit was ever depending in that Court between them and the Lord *Wharton*; so that they could in no sort properly be made parties to the said petition and appeal; and therefore they, 7th January, 1702, petitioned the Lords, setting forth the said matters at large, and prayed to dismiss Lord *Wharton's* petition, and discharge the order for their answering thereunto: But that the Lords, 22d January, 1702*, orderd that *Squire* and *Thompson* should answer

Lords
Journ.
xvii. 204.

* *Die Veneris*, 22d Januarii, 1702. After hearing counsel on the petition of *Robert Squire* and *John Thompson*, and the answer of *Thomas Lord Wharton*, and debate thereon, the question was put, whether this petition shall be dismissed, and they ordered to answer? and it was resolved in the affirmative.

DISSENTIENT.

1st. Because we conceive that by this we assume a jurisdiction in an original cause, for these reasons: First, because there has been no suit between the parties in the Court of Exchequer, and consequently this petition cannot be called an appeal from that Court. Secondly; although there was a suit in the Court of Chancery, yet one of the persons required to answer was not a party in that suit; and therefore, as to him at least, it must be an original cause. Thirdly; though all had been parties in Chancery, yet it never was heard that an appeal lay from one Court that had no suit depending in it, because there was a suit depending in another Court.

2dly.

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Lord Wharton's petition: And that Lord Wharton, 25th January, 1702, moved the House that *Thompson* should be left out of the order for answering his petition; and obtained an order that *Thompson* should not be obliged to answer: And that *Squire* had answered, and said that *Charles Batburst*, Esq. Sir *William Robinson*, Bart. *Robert Byerly*, Esq. *William Bower*, *John Bower*, *John Langstaff*, *Thomas Langstaff*, and *Gregory Ellisly*, were defendants in the suit in Chancery, and plaintiffs in a cross cause in that Court, together with himself, and therefore insisted that they ought to have been made parties to this appeal, together with respondent, if the being a party to a cause in Chancery be any proper foundation for making respondent a party to this petition, complaining of an order in the Court of Exchequer: And that as to the charge in the petition of respondent's contrivance, and designing to cause the parchment to be filed clandestinely as a record of the Court of Exchequer, with intent to use the same as evidence; respondent hoped the Lords would not take cognizance originally thereof, but leave him if guilty of such undue practices, to be tried by the known course of the laws of the realm: And that as to any grievance on petitioner, by such pretended design to file it clandestinely, it appeared by the petition, that the petitioner had been already fully relieved therein, by the order of the 26th of February, 1700, which stayed the filing till the Barons afterwards ordered it; and that therefore petitioner had not in that respect any ground of appeal; and that as to the residue of the petition which imported an appeal from the order of the 15th of July, 1701, and prayed to set aside that order, and to have the record taken off the file; respondent shewed, that the record in question not only greatly concerned her Majesty but all her subjects, who were or might be entitled to lands in that part of the kingdom to which the record relates, and more particularly concerned all persons having lands within the honour of *Richmond*, and lordship of *Middleham*, which honour and lordship respondent shewed, were much larger than the whole

zly. Because no Court can take any cognizance of a cause in which that Court cannot make an order, but in this case the House of Lords cannot make an order, because very many are concerned in this record who are not before the House; therefore this House cannot take any cognizance of it. Signed by eleven Lords. *Lords Journ.* vol. xvii. p. 252.

whole county of *Middlesex*; and respondent stated that divers lands therein had been in the reign of King *Charles* the first, purchased from the Crown by the trustees of the city of *London*, and the greatest part sold by them to several persons, who yet held under that title; all which purchasers, and also all those who with respondent were intitled to the mines in question, in the Court of Chancery, respondent conceived ought to be heard touching this record; and respondent shewed, that the order affected to be appealed from, had not been made in any cause depending in the Court of Exchequer, but was made in exercise of the duty of that Court, to see its records duly kept and preserved from imbezlement, and restored when recovered; and that if the Lords should think proper to receive any complaint against the Court of Exchequer for making that order, or touching the reality of the record, respondent, as one only of many who were or might be equally interested in the record, hoped the Court of Exchequer would be able to give the Lords entire satisfaction in the justice and reasonableness of their proceedings in that matter; and respondent conceived it would be highly improper and officious in him alone, who was but one of many interested in the record, to undertake the defence thereof, lest the justice of the Barons in a point relating to their duty, or the property of so many others concerned, should receive injury by his or his councils inability, neglect or inadvertancy; and therefore, for as much as the matters aforesaid had been examined and received, a determination in the proper jurisdiction; and as the inheritances of many persons of great quality, and of thousand others depended upon the record, who were not made parties to the petition, the respondent hoped the Lords would not proceed to any further examination of the premises, nor make any order touching the same, at least till all parties concerned therein had been heard thereto.

Con.
Phipps.

Die Jovis, 11^o Februarii, 1702. It was ordered by the Lords, that the officers of the Exchequer should bring into the House the bundle or roll in which the survey of the honor of *Richmond* was, which was taken in the 15th year of King *James* the first, the original affidavits upon which the survey was filed, the office book in which there was an entry of a survey taken of the honor of *Richmond* in the 7th of King *Charles* the first, and the survey also itself: And

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Die Veneris, 12^o *Februarii*, 1702. After hearing council upon the petition and appeal of Lord *Wharton*, touching the order of the 15th of *July*, 1701, it was ordered by the Lords that a trial should be had next term, at the bar of the Court of Common Pleas, by a jury of the county of *Middlesex*, in an action wherein this should be the feigned issue: viz. "Whether the "skins of parchment directed by the order of the "Court of Exchequer of the 15th of *July*, 1701, to "be filed, are the perfect, unaltered, exact, and entire "commission and return first filed in the Court of "Exchequer, in the 16th year of King *James* the first?" And that in such action the said *Robert Squire* should be plaintiff, and take upon himself the proof of the said issue, and Lord *Wharton* defendant; and that the said skins of parchment, or any copy thereof, should not be given in evidence in any Court whatsoever until the said trial should be over; and that the said skins of parchment which were now upon the file, by virtue of the said order of the 15th *July*, should not be allowed as any evidence on said trial for the plaintiff; and that the verdict to be given on such trial should be certified and returned by the Court of Common Pleas into this House. *Lords Journ.* vol. xvii. p. 275, 277.

The

20th *January*, 1703. *Charles Bathurst*, Esq. one of the parties named in the foregoing case, petitioned the House of Commons, complaining of this order of the Lords, and the House appointed a committee to enquire and report; and on the report, after some interlocutory orders, the Commons, 28th *January*, 1703, resolved, "That the House of Lords "taking cognizance of, and proceeding on the petition of "*Thomas*, Lord *Wharton*, complaining of an order of the "Court of Exchequer, (viz. the order aforesaid) is without "precedent and unwarrantable, and tends to the subjecting "the rights and properties of all the Commons of England "to an illegal and arbitrary power. And that it is the undoubted right of all the subjects of England to make such use of "the said record as they might by law have done before the "said proceedings of the House of Lords."—(8. *State Trials*, "175.) And the Lords (27^o *Martii*, 1704, together with the resolutions on the case of *Abbey* and *White*), resolved, "That "the House of Commons taking upon them by their votes to "condemn a judgment of the House of Lords, given in a "cause depending before this House in the last session of Parliament, upon the petition of *Thomas*, Lord *Wharton*, and "to declare what the law is in contradiction to the proceedings "of the House of Lords, is without precedent, unwarrantable, and an usurpation of a judicature to which they have "no sort of pretence."—*Lords Journ.* xvii. p. 535.

1702.

The Attorney General, at the Relation of the Master and Wardens

J. L. 2. Km. of the Merchant Taylors Company

397.

ny of the City of London, on the Behalf of the Inhabitants of the City of Coventry, and of the Burroughs of Northampton, Leicester, Nottingham, and Warwick,

Appellant.

The Mayor, Bailiffs, and Commonalty of the City of Coventry,

Respondents,

Case 56.

THE appellants made this case: That Sir Thomas White, of London, being desirous to purchase lands to be settled upon himself for life, and afterwards to charitable uses, did accordingly advance and pay to the mayor, bailiffs, and commonalty of the city of Coventry 1400*l.* and that the corporation soon afterwards, viz. 19th July, 34 H. 8. with part of that 1400*l.* viz. 1378*l.* 10*s.* with Sir Thomas's consent and procurement, purchased from the King certain lands in and near Coventry, of the yearly value 77*l.* 11*s.* 8*d.* reserving to the crown a fee-farm rent of 7*l.* 13*s.* 2*d.* and afterwards, by indenture under their common seal, dated 19th July, 5 Ed. 6. reciting the purchase, and that it was made by the only procurement, aid, and help of Sir Thomas White, and that said Sir Thomas White had of his goodness, given, and paid to the corporation 1400*l.* to obtain that purchase the Corporation, for the consideration aforesaid, covenanted for them and their successors, with the master and wardens of the merchant taylors of London, and their successors, that they the mayor, bailiffs, and commonalty, and their successors for ever, would immediately after the death of Sir Thomas White, yearly give and employ of the rents of the said lands and tenements 70*l.* in manner following, viz. 24*l.* per annum to twelve poor men of Coventry for ever, and also to Coventry 40*l.* yearly for forty years, for the several charities in the deed mentioned; 20 shillings to the merchant taylors for their pains in taking the accounts of the corporation of Coventry; 4*l.* yearly to the mayor, steward, and ten aldermen of Coventry, for their pains, and twenty shillings yearly for ever to the town clerk,

to

to keep an account of the rents and profits of the lands and tenements purchased as aforesaid; and in the first year after the said forty years, 40*l.* to *Coventry*, for other charities in that deed mentioned; and in the second year after the said forty years 40*l.* to the town of *Northampton*, to be lent to four young men of that town in free loan for nine years, and then to be lent to four other young men of the said town for other nine years, and so to continue for ever; and in the third year 40*l.* to the town of *Leicester*, to be disposed of in like manner as *Northampton*; and in the fourth year 40*l.* to the town of *Nottingham*; and to be disposed of in like manner as *Northampton*; and in the fifth year 40*l.* to the town of *Warwick*, to be disposed of in like manner as *Northampton*: and so 40*l.* yearly alternately to *Coventry*, *Northampton*, *Leicester*, *Nottingham*, and *Warwick*, until one hundred years were expired; and from the expiration of those 100 years, such circulation of the 40*l.* to continue for ever through the first five towns, and the whole 40*l.* in every town to be lent to one young man in free loan for nine years, and afterwards to another young man for nine years, and so to continue for ever: And that Sir *Thomas White* enjoyed the lands until his death in 1566; and though some time before his death the lands were let for 79*l.* 10*s.* 10*d.* *per annum*, which is 1*l.* 19*s.* 2*d.* more than when purchased, yet the corporation of *Coventry* accounted with him for the whole 79*l.* 10*s.* 10*d.* and that immediately after Sir *Thomas*'s death, the corporation of *Coventry* had bought a great book to keep an account of the rents and profits of the said land, and had entered therein the particulars of the estate, and a particular entry whereby they acknowledged that Sir *Thomas White* had given those lands *with the increase* to the city of *Coventry*, and the other corporations for charity: And appellant stated further, that the rents of these lands had for many years past increased from 70*l.* to 700*l.* *per annum*, without any expence or charge of the corporation of *Coventry*. And that this corporation had only applied 70*l.* *per annum* to the charities; and disposed of all the increase at their own pleasures, and that the corporation of *Coventry* had by the deed the whole benefit of the charity for forty-one years after the death of Sir *Thomas White*, except 20*s.* *per annum* to the Merchant Taylors; and that the other corporations not having the deed, or any copy of it, were ignorant of

1702. of the improvement of the fund till about seven years ago, and received what the corporation of *Coventry* paid them, which was only 40*l. per annum*; but that about seven years ago a difference arose amongst the aldermen of *Coventry* about dividing the surplus rents, and some of the members thereupon intimated this improvement of the fund to the other four corporations; who thereupon were advised by council, that all the improved rents ought to be applied to enlarge the charities according to their respective proportions; and about seven years since, on the behalf of themselves and the inhabitants of the city of *Coventry*, exhibited an information in Chancery in the name of the then Attorney General, for relief in the premises: And that that information was upon hearing, in *December*, 1700, dismissed by the Lord Keeper; and from this dismissal was the present appeal; and appellant insisted that the corporation of *Coventry* ought not to have the surplus rents, 600*l. per annum*, for which they paid nothing, to their own private uses, and apply only 70*l. per annum* to the charities; but that the whole improvement ought to be applied to increase all the charities, because it appeared both by the original deed, and the account books of the city of *Coventry*, that all the lands were purchased with Sir *Thomas White's* money, intrusted to the city for these charitable purposes: And that the corporation of *Coventry* were only trustees for him; and that the mayor, steward, and ten aldermen had 4*l. per annum*, and the town clerk 20*s. per annum*, given them for their pains in receiving and keeping the accounts, and that no other advantage was intended them; and that if the rents had fallen, each of the charities must have abated rateably, and therefore each ought to have respective benefit of the improvements; and the rather, because Sir *Thomas White* had by the deed plainly shewed his intention, that all the rents should go to the charities, having thereby disposed of all the rent the lands were then let for to the charities; wherefore appellant insisted that the decree of dismissal ought to be reversed, and the increased rents decreed in augmentation of the several charities appointed by the founder.

Robert
Breton.

The respondents, against the reversal, stated, that King *Henry* the eighth, for 1378*l. 10*s.* 6*d.** paid by the mayor, bailiffs, and commonalty of the city of *Coventry*,

Coventry, granted divers of the then late dissolved priory lands in and near *Coventry* to them and their successors for ever, under the yearly rent of 7*l.* 13*s.* 2*d.* reserved to the crown, and that the charges of passing this grant came to 99*l.* 0*s.* 10*d.* so that the consideration money really amounted to 1477*l.* 11*s.* 4*d.* and that it appeared by their books, that the city of *Coventry* of this sum received 1000*l.* from Mr. *White*, afterwards Sir *Thomas White*, and raised the rest by money from the common box, a gold ring, and goods pawned or sold; and received the rents and profits from the time of the purchase to the time of making the indentures or articles between the city of *Coventry* and the merchant taylor of *London*; and that those articles recited that the mayor, bailiffs, and commonalty, had purchased and bought to them and their successors certain lands of the clear yearly value of 70*l.* or thereabouts, as appeared by a schedule annexed, and that such purchase was made by the only procurement, aid, and help of Mr. *White*, minding thereby to relieve and preserve the commonwealth of the city of *Coventry*, then in great ruin and decay; and that Mr. *White*, of his goodness, had given and paid to the mayor and aldermen, for the purpose of the purchase, 1400*l.* and that in consideration thereof the mayor, &c. at the request and mediation of certain friends of Mr. *White*, covenanted with the merchant taylor and their successors, that they, the said mayor, bailiffs, and commonalty, and their successors for ever, should immediately after Mr. *White's* death, yearly give, employ, dispose, distribute, pay, and deliver of the issues, revenues, rents, and profits of the said lands and tenements, the sum of 70*l.* *per annum* to be distributed as stated by appellant, and that the city of *Coventry* gave a bond to the merchant taylor in 4000*l.* penalty to perform these articles, and were subject by their covenants to other penalties for any neglect in disposing the 70*l.* *per annum* as aforesaid; and that it appeared by these articles, and some letters of Sir *Thomas White's*, that he freely gave the city the money they had from him, but it did not certainly appear how the 1000*l.* he gave them at the time of the purchase was afterwards made 1400*l.* and that the city, 7th November, 2 Eliz. for a considerable sum of money paid them by Sir *Thomas White*, granted 40*l.* *per annum* for ever out of all their manors and estate to St. *John's College*, *Oxon.* and that Sir *Thomas White* died in 1566, and

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and sometime before his death made it his request to the city of *Coventry*, by letters and by his will, that they would let his wife have for her life 4*l.* *per annum*; and to induce them to it, reminded them how kind he had been to them; and took notice that the rents of this estate were since the purchase improved in a manner double; and Lady *White* and Sir *William Cordell*, master of the rolls, one of Sir *Thomas*'s executors, had written to them to the same effect, and that the merchant taylors would consent to it; but the city excused themselves, and did not comply; and stated further, that in 1618, upon some complaint to Lord Chief Justice *Hebart*, and Mr. Baron *Bomley*, then Judges of assize for that circuit, as if the charity had been improperly disposed: The merchant taylors certified in writing that they had frequently visited the town of *Coventry*, and examined the books, and found that Sir *Thomas White*'s gift was honestly and sufficiently discharged by the mayor and aldermen, though it appeared by the books that the rents were at that time considerably increased, and that only the 7*l.* *per annum* was applied to the uses in the articles, which had been ever since punctually applied to those uses; save that the four murmuring corporations had not for four or five years past thought fit to accept or call for their 4*l.* *per annum*; and that the city of *Coventry* had quietly received the rents and enjoyed the estate for 150 years; but that the relators of late, pretended that the corporation were not owners of the estate, but bare trustees for the relators, and ought to answer not only the 7*l.* *per annum*, but all the profits of the estate ought to be applied to the same purposes; but the corporation insisted, that the conveyance of the inheritance was made to them, and near a third part of the purchase money originally paid by them, out of their own estate, and the rest given by Sir *Thomas*, and that his bounty had become their property, so that the purchase was to their own use wholly: And that the corporation had never conveyed the land itself to the purposes of the charities, but had barely covenanted to apply 7*l.* *per annum* of the rents and profits, and that the sums payable out of the estate were limited and certain, and appointed to have continuance and be paid for ever, and therefore ought not to be increased: And respondents observed, that these payments were not to begin till after Sir *Thomas*'s death, and that the rents had nearly doubled; so that the intire profits were not originally

originally applied to those uses, and yet never till lately complained of as misapplied; and that when the purchase was made, money was at 10*l. per cent.* and the times unsettled, and the city would never have sold their goods to buy lands at above 40 years purchase; which, including the charges of the grant, they did here, unless from a certain prospect of an advantage to themselves, by increase of the rents which followed accordingly; and that *Thomas White* was so far from being owner of the estate, that there needed the mediation of his friends to obtain the 70*l. per annum* for the charities: And that the title was considered to be so fully in the city, that Sir *Thomas* was not so much as a party to the articles, nor did he join in, nor so much as declare his consent to the settlement, and that if he had any power over the surplus, he would at some time have claimed it, and needed not to have purchased the 40*l. per annum* for St. John's College, or have besought them to grant the annuity to his wife, but might have provided for her out of this surplus which then appeared sufficient; and that Sir *Thomas* s regard for the other four corporations, was small in comparison with *Coventry*; his design in procuring the purchase, being to relieve and prefer the commonwealth of that city; and that even in the settlement of the 70*l. per annum*, 20*l. per annum* was fixed for ever in *Coventry*, and the 40*l.* loan money continued there for 41 years from Sir *Thomas*'s death, and *Coventry* was for ever to have it every fifth year, and though in the corporation books the lands were called Sir *Thomas White*'s lands, respondents insisted that that title was used to distinguish these from other lands of the city, and that all these pretences had been fully heard and debated before the Lord Keeper, assisted by Lord Chief Justice *Holt*, and the Justices *Poucel* and *Blencowe*, who after time taken to inspect the evidences, all concurred that the relators ought not to be relieved, and that the information should be dismissed; and against a great clamour which had been made that no accounts had been kept of this estate, and the surplus profits embezzled and spent in corporation feasts, &c. respondents answered, that it appeared by the accounts and proofs that the surplus had been always applied laudably and charitably, and necessarily, to the augmentation of the maintenance of two ministers; the payment of 40*l. per annum* to St. John's College, the making good the deficiencies of losses in divers other charities, the repair of

1702.

1702. of public buildings, the support of widows, payment of servants, and officers wages, and necessary charities of the government of the corporation, which, with other constant and usual payments, and interest paid for about 2000*l.* which the city owed, came to near as much as all their receipts; and the respondents finally insisted that the lands when purchased, being designed by all parties for the common weal of *Coventry*, and employed to the public accounts of the town, that the surplus ought to be applied according to the first intention of the purchase, the particular charities having been constantly performed; and that therefore the appeal should be dismissed with costs.

See 2. *Die Veneris* 19^o, *Februarii*, 1702. After hearing Brown. P. council upon this petition and appeal, it was ADJUDGED C. 236. by the Lords that the decree of dismission complained of where the should be reversed; and that the Court of Chancery City of should proceed to give such relief upon the information *Coventry* as should be just; the House being of opinion, that the ly removal of the value of the lands in question, ought to be applied in augmentation of the several charities and the trust. *Lords Towns*, vol. xvii. p. 198.

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1702.
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Dame *Elizabeth Northcote*, Widow
and Executrix of Sir *Arthur*
Northcote, Bart. deceased, } Appellant.

Alice Northcote, Widow and Execu-
trix of *John* and *William*
Northcote, Esq. deceased, Sir
Francis Northcote, Bart. Son
and Heir of the said *Arthur*
Northcote, - - - - - } Respondents.

Case 57.

THE appellant made this case: That Sir *John Northcote*, upon the marriage of his eldest son Sir *Arthur*, 24 *Char.* 1. created a term of ninety-nine years, in the greatest part of his estate, to commence at his death, for raising 4000*l.* for purposes to be declared by his will; and by his will, in *June*, 1675, directed the 4000*l.* to be paid to his executors, *John Northcote* his grandson, eldest son of the said *Arthur* and *William Northcote*, viz. 1500*l.* at the end of the first year, 1250*l.* at the end of the second year, and 1250*l.* at the end of the third year after his decease, to be divided amongst his children and grand-children, as therein is directed, and the residue to his executors, and forgave Sir *Arthur* several sums of money he had paid for him, and died in 1676; and that Sir *Arthur* and Sir *John's* executors, trustees, and legatees, considering the circumstances of the family, by articles, dated 30th *September*, 1677, agreed that part of the trust estate, to the value of about 180*l.* *per annum*, should be exempted from the 4000*l.* and that Sir *Arthur* thereupon entered on that part of the trust estate allotted to him by the said articles; and that the said *John Northcote*, and respondent *Alice*, had other parts of the trust estate to the value of 250*l.* *per annum* allotted them, and enjoyed that part; and that the trustees refusing to act, Sir *Arthur* also entered on some other part, and paid part of the 4000*l.* and that before the whole was payable *John Northcote* died, and *William Northcote* survived, and married his widow and executrix, the respondent *Alice*; and that *John*, to incapacitate Sir *Arthur* to pay

{ 1702. } pay the remainder of the 4000*l.* had sued him for the debts paid for him by Sir *John*, his father, and recovered 1600*l.* though Sir *John* had by his will released those debts; and that although *William* and *Alice* were in possession of great part of the trust estate, liable to the 4000*l.* yet they in the trustees names endeavoured to evict Sir *Arthur* out of the estate, agreed by the articles to be enjoyed by him; wherefore Sir *Arthur*, in *Hilary* term, 1681, exhibited his bill in Chancery against them and the trustees, and legatees of Sir *John*, to be repaid the 1600*l.* with interest; and after that cause had been heard, and twice re-heard, obtained a decree to be repaid the 1600*l.* with interest, but died before the account settled, and appellant, his widow and executrix, revived the decree, and obtained the master's report, that there was due for principal and interest 2756*l.* 1*l.* 4*d.* which report was on exceptions confirmed: And that the Court of Chancery, 10th. *November*, 1691, enlarged the time for payment of the 2756*l.* 1*l.* 4*d.* with interest, which made 2797*l.* 8*l.* 1*d.* and, instead of paying this, *William* and *Alice* appealed from the decree, and that upon full hearing the Lords dismissed the appeal, and affirmed the decree; and that respondent *Alice* and *William Northcote* for a long time avoided the performance of the Lords decree, by vesting their estate in members of parliament, who insisted on privilege and other dilatories, so that appellant was for ten years kept out of the monies decreed her and interest; but after every opposition got a sequestration from Chancery against the estate of *William* and *Alice*, but never could levy sufficient to pay her costs; and that Sir *Arthur*'s creditors, tired out with these delays, were importunate for their debts, and that appellant considering the monies so decreed to her, assets, of her testator, subject to his debts, did upon the credit thereof pay his debts by judgments and specialties, to the amount of the money due under the decree, in expectation of being reimbursed out of that money; and that Sir *Frances Northcote*, son and heir of Sir *Arthur*, brought his bill in Chancery against appellant, and said *William* and *Alice Northcote*, for an account of what had been received out of the trust estate, and to be quieted in the enjoyment thereof; and that in that cause an account was decreed to be taken of what had or might have been raised towards discharge of the 4000*l.* and how the profits had been applied, and

and that any deficiency should be borne and paid in average between Sir Francis, William, and respondent Alice, according to their respective interests in the trust estate, and that William and Alice should make good what appellant could charge them with, towards payment of the 4000*l.* and interest; and that appellant should make good what Sir Arthur had received and not paid, as far as she had assets of Sir Arthur; and that the Master, 20th December, 1701, reported that Sir Arthur had received 3534*l.* 7*s.* 8½*d.* out of the trust estate, and appointed the money so decreed to appellant to make the same good, so far as it extended, and made Sir Arthur debtor 778*l.* 16*s.* 4½*d.* and appointed same to be paid by appellant out of Sir Arthur's assets; and that to this report appellant took several exceptions, and amongst others, that the Master had allowed no interest for the money decreed from the time of the decree affirmed by the Lords, which exception as to interest was over-ruled, and the Master's report confirmed; and that appellant had thereby lost the whole 2797*l.* 8*s.* 1*d.* and ten years interest; and that appellant was aggrieved by this decree, because she had paid her testator's debts out of her own estate, in confidence of the Lords former decree; and if she were disabled to retain to reimburse herself, as by law she had a right to do, she would be wholly defeated of the benefit of that decree; and therefore insisted that the decree so made in Sir Francis Northcote's cause, ought to be reversed.

H. Poley,

The respondent Alice on the other hand shewed, that Sir John Northcote had by his will made his grandson John Northcote, respondent Alice's first husband, and William Northcote, her second husband, executors and residuary legatees, and particularly gave them the 4000*l.* and appointed them to pay thereof 2926*l.* legacies to twenty several persons; and that on Sir John's death, Sir Arthur, notwithstanding the trust, entered upon the whole estate: And that on John Northcote's death, respondent Alice had become intitled to the possession of the lands of Newton St. Cyre's as her jointure, settled on her in lieu of 8000*l.* portion, notwithstanding which, and although the 4000*l.* might have been raised by that time, Sir Arthur kept possession till 1682, and died in 1688, having only paid 250*l.* towards interest of the 4000*l.* and that by his death the estate subject

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1702. { subject to the trust came to the respondent Sir *Francis* and as to the 2756*l.* 1*s.* 4*d.* and appellant's claim to it; respondent stated that Sir *John*, by his will, took notice that he had paid several considerable sums for his son, Sir *Arthur*'s debts, and forgave him all that money, upon condition that he indemnified his executors from other monies, for which Sir *John* had been surety, and paid for Sir *Arthur*, and of which securities he, Sir *John*, had taken assignments, and Sir *John*'s executors compelled Sir *Arthur* to repay those sums; and that Sir *Arthur* thereupon in *Hilary* term, 1681, exhibited his bill, and in *Easter* term, 1682, a supplemental bill to be relieved touching these sums, and about raising the 4000*l.* and 11th *July*, 35th *Car.* 2*d.* obtained a decree (amongst other things) to be reimbursed by said *William Northcote*, and another defendant, and one *Edward Row*, proportionably the sum he had so paid in discharge of those debts, with interest, which by his bill he charged to be 1100*l.* yet that Sir *John Franklin* the Master, 31st *March*, 1691, reported the same to be 1600*l.* and carried on interest for the same, making 2756*l.* 1*s.* 4*d.* and appointed the said *William Northcote*, and the respondent *Alice* his wife, to pay that sum to appellant, who had revived the suit, but never proceeded further thereon till after the death of respondent *Alice*'s husband, and then appellant seized respondent *Alice*'s jointure, by a sequestration out of Chancery, which was afterwards discharged for irregularity; and appellant soon after prosecuted another sequestration, and got possession of respondent *Alice*'s jointure, and kept it three years: And that it appeared by the report that respondent's husband, *William Northcote*, and said *Edward Row*, received the greatest part of the said 1600*l.* and yet appellant would not prosecute their administrators, though they were parties to the suit, but would lay the whole burthen on respondent, who, during all those proceedings, was a *feme covert* , and would also carry on interest upon interest, and levy the whole out of the respondent's jointure, which was all her subsistence; and that the now respondent, Sir *Francis Northcote*, 31st *January*, 1689, exhibited his original bill in Chancery, to have the benefit of the decree as to the 4000*l.* and that respondent *Alice*, and her said husband, and the other defendants, answered presently; but Sir *Francis* did not press appellant his mother, to answer till three years after, viz. the 24th *May*, 1692, and after she had got Sir *John Franklin*'s report,

report, and after the former appeal had been dismissed; and that Sir *Francis Northcote* brought his cause to hearing 4th May, 5 *William* and *Mary*, before Lord *Somers*, who decreed amongst other things, that all parties should account before *Dr. Edisbury* for what they or either of them, or Sir *Arthur*, had received out of the estate subject to the 4000*l.* according to the former decree; and that appellant should account and answer for Sir *Arthur's* receipts, so far as it should appear she had assets; and that *Dr. Edisbury*, 10th December, 1701, reported, amongst other things, that Sir *Arthur* had received out of the trust estate, after all deductions, 3534*l.* 17*s.* 8½*d.* to which the appellant Dame *Elizabeth* filed nine exceptions; and on arguing them got allowance only for two sums, viz. 65*l.* and 20*l.* towards sinking the 3534*l.* 17*s.* 8*d.* and that by the report confirmed the account stood thus:

	<i>l.</i>	<i>s.</i>	<i>d.</i>
Received by Sir <i>Arthur</i> out of the trust estate, after all deductions,	3449	17	8½
Out of which the report subtracted the said money due to the appellant	2756	1	4
So that there remained due from appellant, to be paid out of Sir <i>Arthur's</i> assets,	693	16	4½

And that appellant did not deny that these sums were rightly computed, and therefore there was no colour to carry on interest, when the whole 2756*l.* 1*s.* 4*d.* was overpaid to Sir *Arthur* before his death, which was at *Egges*, 1688: And that the matter of appellant's 9th exception was, that she was not allowed interest for that 2756*l.* 1*s.* 4*d.* and that the same was not deducted out of the money payable on the trust: And respondent shewed that it was then in the same order, ordered by consent that the 2756*l.* 1*s.* 4*d.* be deducted out of the profits of the trust estate in appellant's hands, received by her husband, Sir *Arthur*, at the time of the affirmation of the decree: And that these two last orders and report were the only matters appealed against, and the chief complaint was that the 2756*l.* 1*s.* 4*d.* ought not to be sunk and deducted, but carried on with interest as a distinct debt: But respondent insisted that the orders and decree were just in that respect, because both demands arose by the same

1702.

same will, and were originally between the heir and executors of the same testator, and were mutually decreed by the same decree; so that it was mutual justice that both parties should mutually perform it; and that that could not effectually be done, but by discounting one demand out of the other; and the rather, because appellant pretended want of assets, and respondent and her husband had admitted assets; so that if there should be no discount, the demand against appellant, or the greatest part of it, might be lost: And that the decree which discounted one demand out of the other, had been made above ten years, and appellant had acquiesced in it all that time without complaint: And that it appeared by the report that respondent had not only answered to the trust the 275*l.* 1*s.* 4*d.* in performance of the decree, and also the profits received by her and her husband, but had satisfied for her average, with an overplus of 25*l.* 8*s.* and above all, respondent insisted that this appeal ought to be dismissed, without entering into the merits, because it was brought to be relieved against appellant's own consent, contained in the last order, which was never done by any Court of justice, especially when appellant did not complain against the words *by consent* being put into the order: And whereas appellant objected, that Sir *Arthur* owed debts of a higher nature than the money for which he was accountable out of the trust estate, which was said to be in nature of a debt by simple contract; respondent answered, that there was no proof in the cause, or, at least, none read, that there were any such debts of a higher nature, or that the appellant had paid any beyond assets; and that the debt for profits received out of the trust estate was decreed against Sir *Arthur* himself by the first decree, and that a decree in Chancery was equal to a judgment at common law: And to another objection, that the decree and orders complained of overthrow the decree in the other cause twice re-heard and affirmed by the Lords, whereby the 275*l.* 1*s.* 4*d.* was confirmed to appellant, respondents answered, that that decree was not in the smallest impeached, but that the only question was, whether appellant should be paid twice, for it appeared Sir *Arthur* had more money in his hands than would satisfy the 275*l.* 1*s.* 4*d.* and yet the appellant would levy it again upon respondent *Alice*, contrary to her own consent in the last order:

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order: And respondent insisted that the case made by appellant was in many parts untrue, evasive and fallacious; for that appellant had passed over in silence her consent to the order of the 4th of *June*, from which she appealed, and complained against the Court of Chancery in the grofs, without specifying a single instance wherein the order complained of was unjust; and that appellant untruly averred, that the order of the 4th of *June* was made in a cause commenced in Chancery since appellant's decree affirmed by the Lords; whereas that cause had been commenced 31st *January*, 1689, above two years before the affirmance: Wherefore respondent having been above twenty-one years in Chancery, not as plaintiff, but defending herself and her jointure against such unreasonable demands, insisted that the appeal ought to be dismissed with costs.

W.
Dobyns.

The respondent, Sir *Francis Northcote*, on his part stated, that Sir *Arthur* continued in possession of the trust estate, intending to raise and pay the 4000*l.* and paid part; but that *John*, his son, soon after dying, respondent *Alice*, his widow and executrix, married *William Northcote*, Sir *John*'s surviving executor, and syled and recovered from Sir *Arthur* the monies mentioned in the appeal, and obstructed his payment of the residue of the 4000*l.* and occasioned him to commence the suit in Chancery, and that respondent was no party to that suit, nor to any proceeding; but that on Sir *Arthur*'s death the trust estate descended to respondent, and that *William* and *Alice Northcote*, notwithstanding Sir *Arthur* and they had raised out of the trust estate more than would have paid the 4000*l.* and interest, endeavoured to evict respondent out of the possession of the trust estate; wherefore respondent exhibited his bill, upon which the proceedings before stated were had; And that both appellant and respondent had excepted to Doctor *Edisbury*'s report, and those exceptions were heard the 4th *June* last, and the order of that date then made, by which respondent conceived himself much injured, and obtained an order to re-hear those exceptions, but that this appeal had retarded such re-hearing: And that respondent's suit was only to discharge his lands and estate of the 4000*l.* and interest, which was by Sir *Arthur*

Arthur and *William Northcote's*, and respondent *Alice's* receipts, out of the trust estate, really raised before the death of *Sir Arthur*, if duly accounted for; but that instead of taking the account, as was most just, the whole 4000*l.* and interest, was by the report carried on to *December*, 1701, as if nothing paid or received in that time; and yet that *William Northcote*, the surviving executor of *Sir John*, and person to whom the 4000*l.* was payable, had, in 1691, of *Sir Arthur's* money to answer his receipts out of the trust estate, according to the decrees and orders, 2797*l.* 8*s.* 1½*d.* and had actually received out of part of the trust estate, himself, in 1688, 2400*l.* more, which was not sunk, or applied in case of respondent, as received, but that interest of the whole 4000*l.* was carried on and charged for many years after such receipt, to respondent's great wrong: And respondent insisted, that if the account were taken of the monies raised out of the trust estate as received, and so applied, it would appear his estate had answered, and made good the whole 4000*l.* and interest, with considerable overplus, to free his estate from which charge was the sole end of his suit; and that the chief matter of the appeal was between appellant and respondent *Alice*, and not relative to this respondent; who insisted the appeal ought to be dismissed as to him with costs, unless directions should be given for due taking and stating the accounts, and applying the rents and profits of the trust estate, as received in discharge of the 4000*l.* and interest, and freeing the respondent's estate accordingly.

Wm.
White-
locke.

Vin. iv. *Die Veneris*, 19^o *Februarii*, 1702. After hearing council upon this appeal, it was ORDERED by the 477. vii. Lords that the same should be dismissed, and the order 398. viii. and decree of the 4th of *May*, in 5th year of King 299. *William* and *Queen Mary*, and the report of the 20th Prec. ch. 115. cited *December*, 1701, and the order of the 4th of *June* last, in *Sparing* for confirmation thereof, should be affirmed, as against v *Lynn*. Dame *Elizabeth Northcote*, but that the right and interest of the respondent, *Sir Francis Northcote*, should v *Vern*. 137. cited in *Roberts* not be in any ways prejudiced thereby, *Lords Journ.* v *Bennett*. vol. xvii. p. 297.

Captain

1703.

Captain Thomas Sandes, Appellant.

Sir John Shaw, Bart.

Collector of the
Customs Inwards

in the port of Lon-

don, William Wat-

terson, and Charles

Towers, Officers

under him,

Respondents,

in Error.

THE appellant for reversal of the judgment made Case 58. this case; that in an *Indebitatus assumpsit*. brought by appellant, against the respondents in the Exchequer, for 200*l.* and *non assumpsit*. pleaded, a special verdict was found; that by the act of tunnage and poundage, 12 Car. 2. there was granted to the crown 1*l.* for every 20*s.* value of goods imported according to the book of rates; that by the 17th rule in the book of rates, the merchant was to be allowed 5*l.* *per cent.* for the subsidy so appointed to be paid: That by an act 2 W. and M. there was granted to their Majesties upon yarn of flax or hemp, imported between 25th December, 1690, and November, 10th 1695, an additional duty of as much as was then charged upon the same book of rates; that for this double duty, the importer was upon security to have four three months to pay it, or after the rate of 10*l.* *per cent.* *per annum* discount upon prompt payment; that this double duty was by the said act, to be collected and paid in the said manner, and with such advantages, and by such rules as expressed in the book of rates, and the rules thereunto annexed: That appellant imported a parcel of yarn, and paid the old subsidy, and had an allowance of 5*l.* *per cent.* and gave security for the new impost, or double duty, and had no allowance at all upon it: That for another parcel imported, he paid the old subsidy and the new impost or double duty down, and had after the rate of 10*l.* *per cent.* *per annum* discount, for four three months, which came to 6½*l.* *per cent.* but had not the allowance of 5*l.* *per cent.* according to the 17th rule in the book of rates: So that the question was, whether appellant ought not to have an allowance of 5*l.* *per cent.* according to the 17th rule in the book of

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of rates, upon payment of this new impost, or double duty, over and besides the four three months discount after the rate of 10*l. per cent. per annum* for prompt payment: Judgment was given in the Exchequer for respondents by two of the Barons, against Baron *Lechmere* (the Lord Chief Baron not giving any opinion upon the merits of the cause), and this judgment was affirmed in a writ of error: And appellant stated that the words of the act were, *for all yarn an additional duty of as much as what is now charged in the book of rates*, and contended that the plain meaning was that yarn should pay a double duty, or as much again as it paid before, and to this the appellant submitted, and stated that the duties upon the act of tunnage and poundage, were usually called the old subsidy, and the duty upon this act of 2 *W.* and *M.* the new impost; and he put the case, that the duty upon the tunnage act for a parcel of yarn came to 100*l.* and said that the 17th rule in the book of rates gave an abatement to the merchant of 5*l.* so that the King's duty would be but 95*l.* and that this was not denied by respondents, but so taken at the custom house, and paid by the merchant: so that the double duty would be but 95*l.* more, but that respondents insisted it ought to be 100*l.* which the appellant insisted was 5*l.* too much, and that the duty payable being but 95*l.* no more could therefore be said to be charged, for that the whole rules, or book of rates, were but one imposition on the subject; and if it had been asked what yarn was chargeable with, or what was payable for it upon the tunnage and poundage act, all persons would answer 95*l.* because the deduction could never be said a charge, but only a reducing the duty to a certain charge or sum, and that the act of 2 *W.* and *M.* was to double the duty only, and not in any case to give more than the former duty; and that in the act 2 *W.* and *M.* which doubled the duty, there was an express clause that the new duty should be collected and paid in the same manner, and with such advantages, and by such rules as were mentioned in the act of tunnage and poundage, and the rules and orders thereunto annexed; and that therefore clearly no more ought to be paid for the new impost than was paid for the old subsidy, this being intended only to double the duty.

Sam.
Dodd.

The respondents in affirmance of the judgment, stated that the 17th rule in the book of rates, was, *that every merchant*

merchant should be allowed upon all goods and merchandizes appointed to any the subsidy of poundage according to the rule of this book to be imported, five pounds in the hundred of all the said subsidies of poundage so appointed to be paid; and respondent observed, that by this act the subsidy of poundage was to be paid in ready money at the importation of the goods, and therefore a discount of 5*l. per cent.* was allowed the merchant out of the custom to be paid; and that by a clause in the act of *W. and M.* for the encouragement of merchants, it was enacted, that for the additional duties thereby imposed on the said yarn, &c. imported, as aforesaid, the importer giving security at the custom-house, should have time, not exceeding 12 months for payment of the same, from the importation, to be paid by four equal quarterly payments; or, in case such importer should pay ready money, he should have after the rate of 10*l. per cent.* for a year of the said duty abated him, and that for the advantage of the crown, it was further enacted, that the said impositions and duties above-mentioned, should be raised, levied, collected and paid, unto their majesties and their successors, in the same manner and form, with such advantages, and by such rules, means and ways, and under such penalties and forfeitures as were mentioned and expressed in the act of 12^o *Carol. II.* and the rules and orders thereunto annexed; and that that act, and every article, rule, and clause therein contained, should stand and be in force for the purposes aforesaid, during the continuance of the said act: And defendant stated, that plaintiff had after the commencement of the latter act, imported yarn, for which he paid at importation the subsidy in the act of *Car. 2.* and had allowance of 5*l. per cent.* thereout, according to that act, and paid likewise the new impost for part of the same at importation, and had out of such new impost a discount at the rate of 10*l. per cent.* for prompt payment, allowed by the act of *William and Mary*, and gave security for payment of the new impost of the residue of the goods so imported in 12 months according to the act; and at the end of 12 months, paid the new impost, and had no allowance out of it, having had 5*l. per cent.* discount on payment of the subsidy of poundage, payable on the importation of the goods, and having had a year's time to pay the new impost in; and that plaintiff afterwards pretended he ought not only to have had a year's time to pay the

new

1703.

new impost in, or 10*l. per cent.* discount for prompt payment, but also to have 5*l. per cent.* more allowed him out of the new impost, as he had out of the old subsidy of poundage, which would be at the rate of 15*l. per cent.* out of the new impost, and brought his action in the Exchequer, *Michaelmas 8^o. Will.* against respondents, who as officers of the customs had received the new impost, for 85*l. 6s. 8d.* to which the 5*l. per cent.* demanded, would have amounted; and that all the matter being found by a special verdict after several arguments in the Exchequer, it was adjudged for respondents, and that judgment afterwards affirmed in the Exchequer chamber by the Lord Keeper of the Great Seal of *England*, assisted by the Chief Justices of the Queen's Bench and Common Pleas; which judgment defendants insisted was just; for that it appeared plainly that Parliament did not intend to give any further allowance out of the said new impost than a year for payment, or 10*l. per cent.* discount for prompt payment; and that Parliament having given so great allowance to the merchant out of the new impost, did not intend by referring to the rules in the book of rates, to give further allowance of 5*l. per cent.* beyond the 10*l. per cent.* but that the rules were referred to for the methods of collecting the new duty, and that this was taken to be the intent of the Parliament, ever since giving the new impost; and constantly and readily paid by all merchants, and never doubted till appellant made the question; and that to determine it otherwise now, would draw back from her Majesty above 100,000*l.* in lieu of what had been so paid in the last reign, and be a vast loss to her Majesty in her customs for the future.

T. Powys.
S^rm. Har-
court.

Die Mercurii, 15^o Decembris, 1703. After hearing council this day at the bar to argue the errors assigned in this cause, it was ADJUDGED by the Lords, that the judgment given in the Court of Exchequer, and the affirmance thereof in the Exchequer Chamber, should be affirmed and that the writ of error; and transcript thereof, be remitted to the court of Exchequer, to the end execution might be had thereupon, as if no such writ of error had been brought.—*Lords Journ.* vol. xvii. p. 349.

Charles

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1703.
}

Charles Allanson, Esq; surviving
Executor of *Sir William Wil-* } Appellant,
liams, deceased,

John Doulsen, Attorney at Law,
and *Beata* his Wife, Executrix
of *John Evans, her former* } Respondents.
Husband,

THE appellant made this case: That *Sir William Case 59.*
Williams, 25th June, 1695, made his will, and

appellant and *John Evans* executors, and that Viscountess Dowager *Bulkley* had secured 2600*l.* to *Sir William, by mortgage, dated 18th September, 1695,* and that *Sir William* owed appellant 2000*l.* with interest by his bond, dated 19th *December, 1696,* besides 300*l.* with interest, secured by *Sir William's* bond and judgment, to *Nicholas Hall, in trust for appellant, and died in December, 1696,* and that *Evans* alone proved his will; and that a bill in Chancery was exhibited in *May, 1699,* by *Lady Bulkley* against *Evans* and appellant, to be relieved against proceedings at law for the money she owed *Sir William;* and she, to obtain an injunction, brought 1392*l.* into Court; and that *Evans* proposed that out of that 1392*l.* and the first money to be received by *Sir William's* personal estate, he *Evans* should be paid 1500*l.* and upwards; 742*l.* 7*s.* 10*d.* whereof he pretended he had paid to *Sir William's* creditors, and expended the remainder in suits relating to the executorship, and that he would make such his payments and disbursements appear by sufficient vouchers, which should enable appellant to account in case *Evans* should hapen to die; and that upon those terms appellant was prevailed on to sign and seal a writing to the effect aforesaid, dated 6th *May, 1699,* which was prepared and engrossed during the time of a visit made by appellant to *Evans, at his lodgings at Barnet;* but that *Evans* during his life could never be prevailed upon to give appellant copies of his receipts or vouchers; but died in *January, 1699,* having made his will, and *Beata* his wife executrix, who afterwards intermarried with respondent *John;* and that they exhibited their bill in Chancery for performance of that agreement,

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agreement, and to have satisfaction for 1500*l.* more pretended to be due to him by Sir *William's* bond: And that appellant by his answer insisted that the agreement was gained upon the terms aforesaid, which never were performed: And that appellant had a right by law to retain the assets of his testator, towards satisfaction of the debt due to himself in the first place; and that the cause was speeded beyond the ordinary rules, and an order obtained for publication before appellant had completed his examination; and that the Master of the Rolls on *Tuesday*, 3d *November*, 1702, on the usual affidavit, ordered that publication should be enlarged till *Friday*, which appellant's clerk was forthwith to have personal notice; pursuant to which order, *Thomas Price*, Esq; and Mr. *William Collier*, were examined as witnesses for appellant: And that appellant, 7th *November*, 1702, had his depositions from the examiner, whereby it appeared that before the agreement executed, appellant was urgent to have had the perusal of *Evans's* accounts, and was prevailed on to execute it upon *Evans's* express agreement, that appellant should have the accounts; and by reason of *Evans's* sickness, and his, and *Price's* importunity, the same was then so executed; which otherwise appellant would not have executed before the accounts settled: And that *Collier*, who was *Evans's* clerk, had proved that *Evans*, who was an attorney, had received satisfaction from other persons, of several of the sums charged upon the appellant in the same accounts, and that the accounts were made up without entries in any books, and without vouchers to justify them; And that *Collier*, was directed by his matter to insert in the accounts all sums which *Evans* collected ought to have been paid to any of the creditors of Sir *William*, though *Evans* had not paid the same, or any part thereof; and that 21st *November*, 1702, after publication past, and the depositions delivered out upon suggestion that the said affidavit was not filed until after the witnesses were examined, and that the respondents clerk was not served with the order of the 3d of *November* until the 4th, though that was as soon as the order could be got drawn, yet the said order of the 3d of *November* was by order discharged, and appellant's depositions suppressed; and *Collier* and *Price* ordered to attend at the hearing, to be examined as the Court should direct; and appellant could not prevail to have that order varied; And that 7th *December*, 1702, the

the cause came to be heard, and *Price* and *Collier* attended, but were not admitted to be examined, *Vious* case, whereby appellant was utterly debarred of their testimony; and it was then decreed, that the effect of the writing executed by appellant should be performed, and the 1392*l.* then in Court, applied to pay plaintiffs so far as the same would extend, and that appellant should pay the residue out of the first money he should receive of his testator's personal estate, and an account was decreed to be taken; and appellant was also decreed to pay respondent the money due on the said bond for 1500*l.* so far as he had assets, so that respondents were in the first place to be paid upwards of 3000*l.* out of the personal estate of Sir *William Williams*; and appellant complained that he was aggrieved by the orders of the 21st *November* and the 7th *December*, because the affidavit whereon the order of the 2d *November*, 1702, was founded, was filed before 21st *November*, 1702, and was to all intents and purposes as effectual as if filed 3d of *November*, 1702, and because, before *Price* and *Collier* were examined, they were severally produced, and shewed in person at the seat of respondents clerk, and the usual notice in writing left with him; and because before either of the witnesses were discharged from the office, respondents clerk had personal notice of the order of the 3d of *November* on *Wednesday* the 4th, two days before publication was to pass, and might have cross-examined them, and, had they been in any sort aggrieved, might have applied to the Court, and so no inconvenience to respondents, but that by discharging the order of the 3d of *November*, and suppressing the depositions, there was the greatest inconvenience to appellant; who was forced to contest with his adversary, and deprived of his evidence, and this without any default of his, or material neglect of his clerk: And appellant complained further that by the decree 1392*l.* of testators estate that was to be applied towards payment of 700*l.* and upwards, pretended to be paid to creditors, and 800*l.* and upwards to an attorney for law charges, without examining the same, or ordering the accounts and vouchers to be delivered over to the appellant, the surviving executor, to enable him to account with such persons as had demands from testator's estate: And that no decree ought to be made touching the 1500*l.* pretended to be due on the bond to *Evans*, for that respondent, his executrix, had remedy for that debt at common law, where

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where the appellants might have benefit of the administration of his testator's estate; and that said bond was not within the agreement whereon the decree was grounded; and by respondents own shewing the intention of the testator, was that his debts of speciality should be paid out of his real, and not out of his personal estate.

J. Hooke.
P. Crawford.

The respondents on the other hand shewed, that Sir *William Williams* had, by his will, devised his real estate of 2500*l. per annum* to Sir *Boucber Wrey* and his two sons, for their respective lives, remainder to King *William*, his heirs and successors for ever, subject to a rent-charge of 540*l. per annum.* to appellant and his heirs for ever, and made appellant and *Evans* executors and residuary legatees; and that testator died indebted to several persons, and particularly to *Evans* 1500*l.* by bond: And appellant declining, *Evans* alone proved the will, and was at great expence in several suits in law and equity, relating to his executorship, and paid great sums for Sir *William's* debts; and that *Evans* being sickly had retired from *London* to *Barnet*, and finding himself not like to live, and being greatly in disburse upon the executorship account, sent to appellant to come to him there, that his accounts might be stated and settled in his life time: And that appellant, who was himself a barrister, together with *Thomas Price*, Esq. a barrister, went to *Evans* at *Barnet*, who produced his accounts and papers to them; and that it appeared *Evans* had paid for Sir *William's* debts 742*l.* 17*s.* 10*d. ob.* and expended for law, and other charges relating to the executorship, 834*l.* 8*s.* 4*d.* above all assets come to his hands, and that thereupon appellant, being well satisfied with *Evans's* accounts, the agreement stated by appellant was drawn by *Price*, and perused by appellant, and mutually executed, that the 1392*l.* due by Lady *Bulkley*, should be applied to pay the *Evans* the 742*l.* 17*s.* 10*d. ob.* and that the residue should go towards paying him the 834*l.* 8*s.* 4*d.* and that the remainder of the 834*l.* 8*s.* 4*d.* should be paid by appellant out of the first money he should receive out of the residue of Sir *William's* personal estate: And it was thereby declared, that *Evans's* bond of 1500*l.* was not included in that account, nor satisfied; and that *Evans* soon after died, and made *Beata* executrix, who married respondent *Doulben*; and that then appellant proved Sir *William's* will, and received great part of his personal estate; but refusing to perform the said agreement, respondents brought

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brought their bill for a specific performance thereof, and to have satisfaction of the said 1500*l.* bond-debt, and that the cause being at issue, it was ordered, 3d *March*, 1701, that both sides should examine their witnesses that vacation; and that publication should pass the first day of *Easter* term, and the cause be set down to be heard some time in that term: And that, 7th *May*, 1702, it was ordered that publication should be enlarged for a week, and that respondents set down their cause; and the depositions then taken were published, and respondents had copies thereof, and were ready for hearing; but that, 11th *July* 1702, just before the cause was to have been heard, appellant obtained an order to enlarge publication till the 1st day of *Michaelmas* term, and liberty to take out commissions to examine his witnesses in the interim; and that appellant took out two commissions, one into *Wales*, and another into *Yarishire*, but executed one only, and did not return that by the time limited; but 3d *November*, 1702, almost a fortnight after publication had passed, under the order of the 11th *July*, appellant petitioned the Master of the Rolls, that publication might be enlarged for three days, and annexed the usual affidavit, and his honour answered the same in these words, "filing the affidavit, let it be as desired, saving all just exceptions, but of this give personal notice to the appellants clerk in Court forthwith;" and that appellant examined *Collier* 3d, and *Price* 4th *November*, 1702, both of whom, and appellant, lived all along in *London*, and might (had a fair examination been designed) have been examined between the 3d of *March*, 1701, and the 1st day of *Michaelmas* term, 1702; and that respondent's clerk was not served with that order till both witnesses were examined and gone; nor was the affidavit, upon which that order was grounded, filed till 19th of *November*, 1702, the day respondent gave notice that they would move the Court to suppress the depositions of *Collier* and *Price*, as irregularly taken; and that after the order of the 21st *November*, 1702, appellant applied to the Court no less than three times to set up those depositions, and which the Court as often, upon full hearing, denied, declaring that they were irregularly taken, and contrary to the known rules and practice of the Court: And that the decree complained of, was made on the 7th of *December*, 1702; which decree and order, respondents insisted ought to be affirmed, because the irregularity for which the depositions were

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were suppressed, was a practice which if countenanced, would prove of most dangerous consequence to the suitors: And the Master of the Rolls at one time called before him the clerks on both sides, and the person that examined the two witnesses, and upon deliberate examination it appeared that both the witnesses were examined, and gone before the respondents clerk in Court was served with the order of the 3d of November, which was not to be made use of till the affidavit was filed, and the clerk in Court had personal notice thereof: And because the accounts and vouchers, the want of which appellant complained of, did not appear by any proof in the cause, to have come to respondents hands; and that respondents by their answer to a cross bill exhibited by appellant, had sworn that they had not ever had any such accounts or vouchers, and believed they were delivered to the appellant at the execution of the agreement: And respondents contended, that though there was no provision by the agreement for payment of the 1500*l.* bond-debt, yet it particularly expressed that that debt remained entirely unsatisfied, and that respondents were proper to sue in equity for a satisfaction of that debt out of assets, and that appellant had not entitled himself to retain, nor shewed that any debt was due to him from the testator, and by the decree he was to have all just allowances: And respondents shewed, that after the decree inrolled, appellant had brought his bill of review, and therein assigned the very same errors assigned in his appeal; and that upon arguing a demurrer put in thereto by the respondents, these errors were all over-ruled, and the bill dismissed.

Thomas
Vernon.

Die Martis, 18^o Januarii, 1703. After hearing council on this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the decree and order complained of affirmed.—*Lords Journ.* vol. xvii. p. 375.

Anne

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Anne Hassel, Administratrix with
the Will of Roger West, Esq. } Appellants.
who was Administrator of
Eleanor his Wife, and others,

Sir Thomas Knatchbull, Bart. Ex- }
ecutor of his Brother, Sir } Respondent.
John Knatchbull,

THE appellant shewed, that this appeal was against Case 60.
a decree of dismission of a bill in Chancery, brought
by Mr. West, for recovery of 500*l.* and interest, part
of the fortune of his wife Eleanor, one of the daughters
and coheirs of Sir John Knatchbull; and that the
500*l.* in question, was part of 1400*l.* due from Sir
John Knatchbull to his mother-in-law, Lady Monins,
upon several notes under his hand, payable on demand
with interest: And that said Sir John Knatchbull, having
no son, and only three daughters, left all his estate
to respondent his brother, charged with his debts and
legacies, and with portions of 3300*l.* a-piece for his
three daughters: And that after Sir John's death, Mr.
West treated for marriage with Eleanor, one of the
daughters, and was assured, that Lady Monins her
grandmother, would give her 500*l.* more, part of
the said 1400*l.* in addition to the 3300*l.* left her by her
father, and that the match was concluded upon those
terms; and Mr. West before marriage made a settlement
for her, and provision for her issue by him suitable to
that fortune, and that Eleanor assigned her portion of
3300*l.* and Lady Monins the 500*l.* in question to
trustees, for the benefit of Mr. West; and that respondent
afterwards paid Mr. West the 3300*l.* but not
the 500*l.* and that Mr. West, together with Lady
Monins and the trustees, brought their bill against respondent,
to compel him to pay the 500*l.* as a debt due
to Lady Monins, and by her assigned to Mr. West; and
that respondent by his answer admitted assets to pay
the 500*l.* but alleged that the Lady Monins had given
Sir John the 1400*l.* towards increale of his said daughters
portions, and that Sir John intended to include and
sink that money in the portions of 3300*l.* a-piece which
he gave them: And that the cause was heard the 7th
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day of *May* last before the Lord Keeper, who dismissed appellant's bill : And that respondent laid great stress upon a paper written by Sir *John Knatchbull* himself, touching the 1400*l.* and lady *Monin*'s intension of giving it to increase his daughters portions, and relied also upon some general discourse Sir *John* had with Mr. *Heskins*, one of his executors; who in his deposition had made inferences, and formed arguments to support his own opinion and belief, although he, *Heskins*, was all along privy to Mr. *West*'s marriage treaty, and a party to his settlement, where it was recited that Sir *John*'s estate stood chargeable with both sums; and appellant insisted that the words of Sir *John*'s will not being of a doubtful signification, no such collateral foreign evidence ought to be admitted to support the presumption for which the respondent contended, especially when the will itself seemed to exclude all presumption; for it expressed that these portions of 3300*l.* a-piece to his daughters, were given them in lieu and full satisfaction of the respective sums appointed to be raised for their portions by his marriage-settlement: And appellants insisted, that what was so expressly declared to be given in satisfaction of one thing, should never be presumed to be given in satisfaction for another; and that Sir *John* had not power to dispose of this money; And that Lady *Monin*, in answer to a cross bill brought against her, denied the truth of the memorandum made by Sir *John*, and swore she only intended to give it amongst his daughters, as an addition to their portions when they married, provided it were with her consent; and that her ladyship's keeping Sir *John*'s notes given her for the money, confirmed this: And appellants shewed, that when Sir *John* paid his daughter *Elizabeth* 500*l.* of this money upon her marriage with Mr. *Lely*, Lady *Monin*'s consent was asked to the match, and her directions given for the payment of it : And appellants contended further, that as Sir *John Knatchbull* never was debtor to his daughter *Eleanor* for the 500*l.* in question, he therefore could not ease himself of that 500*l.* or sink it in her portion of 3300*l.* And further, that the 500*l.* in question never vested in *Eleanor*; so that she could never have released it to her father; and that even upon a due construction of his own memorandum, *Eleanor* was not to have the 500*l.* unless she married, which was after her father's death, and after the assignment; but the 3300*l.* was devised

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devised to her absolutely; and yet, if she had died un-
married, she had no pretence to the 500*l.* and that by all
this it appeared it was never intended to be included
therein.

The respondent, in affirmance of the decree, stated,
that Sir *John Knatchbull* had, in 1679, intermarried
with the daughter of Lady *Monins*, and by his mar-
riage settlement, among other things, created a term
of 1000 years for raising 800*l.* for daughters por-
tions in case of three or more daughters, and no issue
male; and that Sir *John* had issue a son and three
daughters, and the son arriving at the age of 21 years,
and being tenant in tail in remainder, in 1689 joined
with Sir *John* in a recovery to destroy the term, and
soon after died without issue: And that Sir *John*, in
1689 and 1690, borrowed 1400*l.* from Lady *Monins*,
and gave his notes for repayment thereof, with interest
at 5*l.* per cent. and afterwards, in 1691, entered into a
treaty to marry his eldest daughter *Elizabeth* to Mr.
Lely, and offered to advance 2500*l.* for her portion;
and Lady *Monins*-likewise offered to add 500*l.* out of
the 1400*l.* to make that fortune a compleat 3000*l.* and
that that marriage took effect, with this variation only;
that instead of the 3000*l.* Sir *John* assigned to Mr.
Lely certain marsh lands in *Kent*, to the value of 160*l.*
per annum; and that as to the 900*l.* residue of the 1400*l.*
Lady *Monins* agreed with him, that that money should
sink in his hands, provided he would add 500*l.* a-piece
to the fortunes of the two unmarried daughters;
and that Sir *John* gratefully acknowledged Lady
Monins's bounty, and at his death left a note in his
study, to testify his thanks for the same; and also to
prevent all mistakes touching his notes for the 1400*l.*
which lay out in Lady *Monins*'s hands against him; and
that Sir *John* afterwards contracted debts amounting
to 18000*l.* and in *October*, 1696, made his will, and
appointed 3300*l.* a-piece to *Eleanor* and *Jane*, his two
unmarried daughters, whereby 500*l.* a-piece was added
to their portions, and declared it to be in lieu of the
provision made by his marriage settlement; and dying
without issue male, devised his lands to respondent, his
brother, subject to his debts and legacies, which were
25000*l.* and that *Eleanor* having after Sir *John*'s death
intermarried with *Wess*, and died without issue, re-
spondent paid the 3300*l.* to *Wess*, her administrator; and

1703. and that respondent in his answer to *Wesl*'s bill insisted, that the 500*l.* was made good according to Lady *Menin*'s agreement, and was comprehended in the legacy already paid to him in his wife's fortune: And respondent now insisted, the Lords ought to confirm the dismission of that bill, for that it had been always taken to be a rule of natural equity, that whenever a legacy of greater value is given to a creditor, it should be presumed to comprehend the debt; and the rather in this case, because it appeared by proofs in the cause, and by a solemn memorandum under Sir *John*'s hand, that he had settled the matter with Lady *Menins*, and had agreed to add the 500*l.* a-piece to the portions of his unmarried daughters; and that in this case it would sound the more harsh to presume the contrary, inasmuch as it would tend to increase the younger daughters' fortunes so much out of proportion to their elder sister, and to lessen the overplus to respondent, who was to carry the honour and name of the family; and that it plainly appeared in proof, that Sir *John*, on all occasions, professed that he never intended to his daughters, out of his own estate, any more than the sum of 266*l.* 13*s.* 4*d.* the portion appointed by his marriage settlement, which, together with this 500*l.* and 133*l.* 6*s.* 8*d.* particularly proved to be designed for their present subsistence, till the time appointed for the payment of their fortunes, exactly amounted to the sum of 3300*l.* the portion limited by his will; and though the words of the will had declared it to be in lieu of the marriage settlement, yet it could not be restrained to that only, because it was fully proved that those words were inserted to answer the peculiar scruple of Mr. *Holkins*, at the drawing of the said will, lest the demand on the settlement should be set up, notwithstanding the legacy; and that it was not to be presumed Lady *Menins* could understand that this debt was still subsisting upon the old notes, when she required his bond for 600*l.* in *July*, 1695, afterwards lent him, and for which she had received a constant interest, without any demand upon the notes, as appeared by proofs in the cause: And respondent shewed that *Wesl*, or his wife, never advanced this pretension in a suit commenced and prosecuted against them by

by respondent for proving Sir John's will, though they therein thought fit to insist on the legacy, and even on the provision by the marriage settlement over and above; nor did *Wess* afterwards, when bond was given by respondent for the fortune, ever pretend to demand it.

Die Mercurii 16^o Februarii, 1703. After hearing council, the Lords ADJUDGED that this petition and appeal should be dismissed, and the decree of dismission complained of affirmed.—*Lords Journ.* viii. p. 438.

Anthony

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}

Anthony Row, Esq. - - - Appellant.

Elizabeth Cockayne, the Wife of } Respondent.
James Cockayne, Esq.

Case 61.

THE appellant made this case: That *James Cockayne* was indebted to him, and had no means to pay him save the equity of redemption of a farm in *Henchwick, Gloucestershire*, then in mortgage to one *John Crispe*, (the respondent's attorney) for about 930*l.* and that *Cockayne* and *Wife*, and *Crispe*, 22d *May*, 1691, by articles under seal, agreed that appellant should be put into possession of the farm, and by the profits paid the money then owing to him by *Cockayne*, and such money as appellant had paid and secured, or engaged to pay for the debts of *Cockayne*, and other moneys disbursed for him, which several sums were reckoned in the articles at 1830*l.* and interest for the same: And the articles reciting that there was on the 16th day of *March* then last 700*l.* due to *Crispe*, over and above any moneys then paid or secured to be paid to *Crispe*, appellant thereby covenanted to pay *Crispe* the 700*l.* with interest upon six months notice, and to pay 42*l.* *per annum* interest by half yearly payments; and *Crispe* covenanted that on such payment he would assign his mortgage to appellant, and that by subsequent articles, 28th *May*, 1691, between *Cockayne* and his wife and appellant, it was further agreed that the farm should be managed by a person to be appointed by them, who was half yearly to account with them, but that the rents and profits should be paid to appellant: And that appellant there- by covenanted that after the 1830*l.* with interest, paid, he would assign the premises on six months notice to such person as respondent should appoint in trust for her: And that it was further agreed, that if the pre- misses should not be managed by a person to be nominat- ed by the parties, then the same should be let for the best rent they would bring, and the stock thereon sold for the best rate, and the moneys paid to appel- lant, towards satisfaction of the 1830*l.* and that a receipt was given by *Cockayne* and his wife for the same, in these words, viz. "Received of *Anthony Rowe*,
" Esquire,

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“ Esquire, the sum of 183*ol.* it being the consideration
 “ money in the articles bearing date the 22d day of
 “ May, 1691. We say, received by us this 22d day of
 “ May, 1691. *James Cockayne, Elizabeth Cockayne:*”
 But that appellant not having then paid *Cockayne* 500*l.*
 part of the 183*ol.* he, to shew there was 133*ol.* and
 no more then due to him, gave a receipt in these words,
 viz. “ Received of Mr. *James Cockayne* and Mrs.
 “ *Elizabeth Cockayne* the sum of 500*l.* in part of 183*ol.*
 “ due to me by articles of 22d May, 1691; but out
 “ of this I must be saved harmless from the Sheriff
 “ of *Glouster*. Witnesses my hand the 28th day of May,
 “ 1691. *Anthony Rowe.*” Which Sheriff had made a false
 return upon an execution issued out against the goods
 of *James Cockayne*, at the suit of Sir *Simon Harcourt*,
 and for which the appellant paid Sir *Simon Harcourt*
 243*l.* 10*s.* besides costs. And that a Mrs. King was
 soon after agreed on by all parties to manage the pre-
 mises, and continued in such management till September,
 1693; but that through ill management, and *Cockayne* and
 wife living upon the premises, appellant could make
 little or no profit thereof; and that appellant, in 1693,
 brought his bill in Chancery to have his money paid,
 or that *Cockayne* and wife might be foreclosed of their
 equity of redemption, and that appellant might redeem
Crispe’s mortgage, on payment of the further sum of
 700*l.* and interest to him; and that, in 1694, respondent
 and her trustees brought their bill, that appellant
 might discover what was due to him upon the articles,
 and that upon payment thereof respondent might re-
 deem: And that upon hearing the causes before Mr.
Justice Powell, 6th July, 1695, it was decreed that a
 Master should take an account of what was due for
 principal, interest, and costs, to *Crispe*, and also of what
 was due to appellant according to the articles, discount-
 ing what appellant had received, and also to tax him
 his costs; and the Master was to examine whether the
 700*l.* agreed to be paid to *Crispe* was part of the 183*ol.*
 secured by the articles: And appellant was to pay what
 should be due to *Crispe*, who was thereupon to assign
 to the two senior six clerks, subject to what should be
 due to appellant, but that if appellant should fail to pay
Crispe, then appellant was to deliver possession to *Crispe*,
 who was to hold the premises until paid; and respond-
 ent was to pay what should be due to appellant, and
 what appellant should pay *Crispe*, if appellant thought
 fit

fit to redeem him; and if appellant would not re- deem *Crispe*, then after *Crispe* was satisfied he was to assign to appellant; and if respondent, or any for her, would pay off *Crispe*, and appellant, then they were to assign their securities as respondent should appoint; And that the Master, in 1697, ascertained *Crispe's* debt at 1012*l* which appellant accordingly paid: And that the Master, 29th November, 1697, made his report, to which respondent excepted, and petitioned to re-hear the causes as to the manner of accounting: And that, 11th July, 1698, the causes were re-heard, and the matter of the report and exceptions heard at the same time; and the Court declared that appellant being in the common case of a mortgagee, ought to have the common directions for accounting as a mortgagee; and therefore (in part) ordered that appellant should, for such time as he had been in possession, account for what he had, or without his wilful default might have received; and for such time as accounts were kept appellant was to be examined upon interrogatories touching the same, but for such times as no account were kept, appellant was to be answerable according to the yearly value; and after the time, *Mrs. King*, the common manager, and one *Mr. Lansten* (who was manager for appellant) left the possession, the account was to be taken according to the yearly value: And that upon debate of the matter of the report and exceptions, an issue at law was directed to try whether the 700*l*. due to *Crispe*, or any, and what part thereof was part of the 1830*l*: Whereas appellant insisted there was not sufficient proof in the cause to ground any such directions, and that the contrary plainly appeared both by the articles and a receipt for the 1830*l*. under the hands of *Cockayne* and his wife, proved in the cause, and the said receipt given by appellant for the 500*l*. and that at a trial had in *London*, respondent's counsel insisted that the 1830*l*. could not be made out as paid by appellant, without reckoning the 700*l*. as part thereof; and that thereupon appellant, though a hardship after an account stated, gave evidence of the payment of several sums of money for *Cockayne's* debts, and other moneys lent and paid to him, which made up the 1830*l*. without the 700*l*. but that respondent then produced an account under appellant's hand made up in *February*, 1961, nine months after the articles, and insisted that what sums of money

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money the appellant had proved paid for the debts of *Cockayne* were allowed in that account, which account not being insisted on, or read at the hearing, nor set forth in the respondent's answer, appellant's council were not instructed therein: And that upon the deposition of *Crispe*, who swore only that he believed, or apprehended, that the 700*l.* was part of the 1830*l.* and upon the evidence of one *Fletcher*, who swore that appellant had confessed to him that the 700*l.* was part of the 1830*l.* and notwithstanding appellant in his answer, and respondent's husband by his answer to respondent's bill, had both sworn that the 700*l.* due to *Crispe* was no part of the 1830*l.* nor was the same in either of the articles mentioned or expressed to be any part thereof, the jury found for respondent: And that on 9th *February*, 1702, upon a re-hearing of the causes on respondent's petition for costs and further directions as to the manner of appellant's accounting, it plainly appeared that appellant had lent and paid to *James Cockayne* before the 22d of *May*, 1691, 854*l.* 17*s.* 11*d.* And therefore, upon the re-hearing, appellant insisted to have another trial, especially since respondent insisted that the jury having found contrary to appellant's answer, he ought to lose his own costs, and to pay respondent's costs; but the Court did not think fit to grant another trial, but ordered that the verdict should stand, and gave several directions touching the manner of appellant's accounting; and instead of appellant having costs, according to the former decree, ordered appellant to pay respondent her costs both at law and in Chancery: And appellant complained that as to the 243*l.* 10*s.* besides costs of suit so paid to Sir *Simon Harcourt* by appellant, and which was proved in the cause, and owned by Sir *Simon*, the Court did not make appellant any allowance for the same; and shewed that the Court, 13th *January* last, upon hearing exceptions to the Master's report of the account, directed a trial at law for settling several other matters in the account; and complained that he was aggrieved by the orders or decrees made since the first decree; and particularly insisted that such issue ought not to have been directed, and that the verdict obtained thereupon ought to be set aside, and he have satisfaction for the 700*l.* paid to *Crispe*, and for interest and costs; or if the issue was properly directed, insisted he ought not to be concluded by one trial, obtained by a sudden producing

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producing of an account, which in its nature required time and consideration to examine into, especially where the consequence was so great to appellant as to make him lose 1012*l.* paid to *Crispe*, for the said 700*l.* with interest and costs, and also appellant's own costs; and further to make him pay respondent 517*l.* more for her costs, besides the injury to appellant's reputation: And complained further, that on arguing the exceptions last mentioned, chiefly upon the evidence of one *Stevens*, who made some proof of an offer to take the premises for eight years, at the rent of 200*l. per annum*, the Court of Chancery had directed appellant be charged to that value, though such offer was made upon such covenants as would have spoiled the farm, and which appellant could not comply with; and though appellant desired liberty to try that matter with the other things directed to be tried, yet the Court refused appellant that liberty.

Browne.

The respondent on the other hand made this case: that she had an annuity of 200*l. per annum* for her life, issuing out of the estate of *Rowland Lacy*, Esq; her former husband, which before her marriage with *Cockayne* was settled on trustees for her sole and separate use, and that she was prevailed on by *Cockayne* to consent to sell it, and purchase the estate in question for her own and *Cockayne*'s lives, the purchased estate to be settled on trustees in like manner for her separate use; and that she accordingly sold her annuity for 1800*l.* with which she purchased the estate in question from Sir *Ralph Dutton*, for her own and *Cockayne*'s lives; but that before the purchase perfected, *Cockayne* had misapplied 600*l.* of the money; and thereupon they borrowed 600*l.* from *Crispe*, and mortgaged the purchased estate to him; and then the premises were conveyed subject to that mortgage to *William Crispe* and *Richard Diston*, in trust for respondent for her separate use; and that *Cockayne* neglecting to pay *Crispe* the interest, and being otherwise indebted to him, he sued him; and, *March* 6th, 1690, 930*l.* appeared due to *Crispe*; and respondent being uneasy under that mortgage, and appellant being avenor*, and

Cockayne

* This is an officer named in the Stat. 12 C. 2. c. 8. and from the purview of the act seems to have been the distributor, buyer, or comptroller of the King's oats, as the word itself in some sort imports.

Cockayne equerry to King *William*, appellant offered to pay off *Crispe*, and reimburse himself by perception of profits; and that they came to a verbal agreement accordingly; and that respondent thereupon, *March*, 1690, actually delivered possession of her house, goods, stock, and farm, to appellant, and left him in possession, and that some time after articles of agreement were drawn between *Cockayne*, appellant *Crispe*, respondent and her trustees: And 1830*l.* being mentioned as due to appellant, and no particular recital how it was made up, or what debts were to be paid, and only a bare covenant to pay *Crispe* 700*l.* respondent refused to execute them till another writing, dated *May* 28th, 1691, but executed at the same time when the articles were drawn, wherein it was recited, that appellant had paid, stood engaged, and secured to be paid 1830*l.* And appellant covenanted on payment of what was due to him of the 1830*l.* to convey all his interest to respondent, or whom she should appoint; and that appellant paid 230*l.* to *Crispe*, and at several times afterwards 100*l.* to respondent; and having covenanted to pay 700*l.* to *Crispe*, and agreed to lay out 300*l.* in stock, which made only 1330*l.* he gave a receipt for 500*l.* as part of the 1830*l.* consideration received back again: And that upon the execution thereof, appellant agreed and declared that the 930*l.* paid and secured to *Crispe* was included in and part of the 1830*l.* and that it was so proved upon the trial at law by witnesses of undoubted credit; and that appellant entered on the estate, and had then other goods and stock worth 500*l.* and a crop of corn, hay, and St. foine growing that year, worth 650*l.* and kept the possession of the estate worth 300*l. per annum*, from 1691 to 1699, and that he, notwithstanding, neglecting to pay *Crispe*, he brought an ejectment to recover possession of the estate: And appellant exhibited his bill to redeem *Crispe*'s mortgage, and that respondent and *Cockayne* might redeem it, or be foreclosed, and demanded the 1830*l.* as due to him, over and above what he paid and should pay *Crispe*; and that *Crispe*, respondent, and her trustees, put in their answers, and respondent in her answer set forth how the 1830*l.* was made up, and that the 700*l.* to *Crispe* was part of the 1830*l.* and afterwards exhibited her bill against appellant for an account of what was paid of the 1830*l.* and how made up,

1703.

up, and to have *Crispe* paid, and an account of what appellant had received, and to have the overplus paid to her, and for a re-conveyance of the estate; and that appellant in his answer swore his debt 1830*l.* exclusive of the 700*l.* to be paid *Crispe*, and prevailed on *Cockayne* her husband to swear to the same effect; and that both causes were heard, and the decree stated by appellant made; and that the Master made a special report as to the 700*l.* payable to *Crispe*, that respondent had positively sworn it to be part of the 1830*l.* and *Crispe* had sworn that he apprehended and believed it to be part of the 1830*l.* and that appellant had sworn that it was not part of the 1830*l.* and that respondent took exceptions to the report, and petitioned to be re-heard, for that appellant had kept the estate in his own hands, and his running and other horses upon it, and ought to be answerable for the yearly value, and not for only what he actually received; and that on the re-hearing an issue was decreed as to the 700*l.* and a trial had before Lord Chief Justice *Holt*, and on full and clear proof to the satisfaction of the Court, a verdict was given for respondent, that the 700*l.* was part of the 1830*l.* and that appellant did not think proper to move for a new trial, but acquiesced under the verdict, and proceeded before the Master; and then proposed a reference to two Council, which respondent agreed to; but that after attendances for above a year and a half, it appearing at last that appellant only designed delay, the reference was broke off, and the respondent proceeded again before the Master; and that on appellant's petition the cause was re-heard, and his petition dismissed, and he did not then complain of the verdict; and that the cause was again re-heard on respondent's petition, as to the matter of costs, and manner of accounting; and that appellant again petitioned to be heard and re-heard, on a suggestion that he had found a duplicate of account, which would prove the 700*l.* to be no part of the 1830*l.* and that the causes were re-heard on both petitions, and then ordered that appellant should account as stated by him, and his answer being falsified by the verdict, he was decreed to pay costs both at law and in Chancery: And it appearing by the account, when produced, that the sums therein could not be part of the 1830*l.* appellant's petition was dismissed; and that respondent brought in a bill of costs, amounting to 1019*l.* which the Master taxed at 517*l.* 18*s.* 3*d.* although the

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the prosecution and defence of these suits had cost respondent more than the bill amounted to; and that the Master made his report, and (with the costs taxed) reported to be due from appellant to respondent 195*l.* 14*s.* 3*d.* And appellant for further delay filed several exceptions, which were heard, and an issue at law directed to try the value of the goods, stock, cattle, corn, and hay, and the yearly value of the estate, from 1691 to 1699; and that notwithstanding all the orders, hearings, and re-hearings, it was true in fact, that from the time respondent gave appellant possession of her real and personal estate, he disposed and managed same at his own will and pleasure, and received the product to his own use, without account to respondent, or making her privy or concerned in the management thereof, contrary to the articles, and kept possession from May, 91, till May 99, when it was taken from him by order of Court; and had or might have raised out of the real and personal estate the sum of 4000*l.* and might have paid off *Crispe's* mortgage the first year after he had possession: And that Sir *Simon Harcourt's* debt, in the appeal mentioned, was a debt due from *Cockayne*, and not chargeable on the mortgaged premises; and appellant had satisfaction for the same from *Cockayne*; and so proved upon a trial at law between Sir *Simon Harcourt* and appellant before Lord Chief Justice *Holt*: And respondent insisted that the only matter in question was, what money appellant lent and secured upon the mortgage, and what he received out of the real and personal estate; and that the money paid and secured was but 1030*l.* as now settled by the verdict, and proofs in the cause; and that if the 700*l.* were not included in the 1830*l.* then by the letter of the articles, as appellant would construe them, respondent's estate, which cost but 1800*l.* was made a security for 2500*l.* viz. 700*l.* more than it was worth, and she consequently utterly ruined.

T. Jones.

Die Veneris, 25^o *Februarii*, 1703. After hearing council upon this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the orders and decrees complained of affirmed. *Lords Journ.* vol. xvii. p. 459.

Edward

{ 1703. }

Edward Scott, Gent. Administrator of *Thomas Scott*, his Brother, deceased, } Appellant.

Richard Hilton, Executor of *John Hilton*, Clerk (his Father, deceased,) who married *Winifred Scott*, the Appellant's Sister, } Respondent.

Case 62.

THE appellant stated, that this appeal was touching a bond pretended to be made (in a very unusual form) by appellant's brother to respondent's father, and which bond was in these words: "Know all men by these presents, that *I Thomas Scott*, of *Great Barr*, in the parish of *Aldridge*, and County of *Stafford*, Gent. Do owe and am indebted unto *John Hilton*, of *Great Barr*, in the parish of *Aldridge*, and county of *Stafford* aforesaid, clerk, the full and just sum of two hundred pounds of good and lawful money of England, to be paid to the said *John Hilton*, his heirs or assigns, with due interest for the same; and also twenty pounds more of the like lawful English money, to be paid to the said *John Hilton*, his heirs or assigns, in lieu of certain goods and cattle due to him the said *John Hilton*, but without any interest for the said twenty pounds: And for as much as the said money, goods and cattle, were by my dear father *William Scott*, of *Great Barr* aforesaid, designed and intended for my loving sister *Winifred*, late wife to the said *John Hilton* aforesaid; and I the said *Thomas Scott* having, for causes to myself best known, hitherto with-held and kept back all the said moneys, goods and cattle, not daring to intrust them in the hands of my loving sister, nor yet of her husband *John Hilton* aforesaid; and now being fully satisfied, notwithstanding the death of my dear sister *Winifred*, late wife to the said *John Hilton* aforesaid, that of right all the said moneys, goods and cattle aforementioned, doth and ought to belong unto him the said *John Hilton*; I therefore the said *Thomas Scott* of *Great Barr* above-mentioned, Do, by these presents, firmly tie, bind, and oblige my heirs, executors, administrators and assigns, and every of them, in the penal sum of one thousand pounds, of good and lawful English money,

“ money, for the true and just payment of the above
 “ mentioned two hundred pounds, with lawful interest
 “ for the same, and twenty pounds without interest;
 “ all which money to be paid to the said *John Hilton*,
 “ his heirs or assigns, *within six months after my decease*,
 “ from the day of the date hereof: And then this present
 “ thousand pounds obligation shall be void, and of none
 “ effect, or else to be and remain in full force and virtue:
 “ *Witness this my own hand and seal*, this 16th day
 “ of *August*, in the 18th Year of the reign of our
 “ sovereign lord, *Charles the 11d.* by the grace of
 “ God, of *England, Scotland, France, and Ireland*,
 “ king, defender of the faith, &c. *Anno; Dom. 1667.*
 Sealed and Subscribed in

the presence of us,

Richard Pretty,

William Lucas,

The mark [A] of *Anne Brockbouse*.

THO. SCOTT.

And appellant shewed, that it was in proof in the
 cause that respondent's father married *Winifred*, to the
 great displeasure of her friends, and that she lived but
 eleven months after her marriage, and died without
 issue, twenty years before the date of the pretended
 bond; that her portion was fully paid, and a discharge
 given under her husband's hand for the same; and that it
 was not at all probable that *Thomas Scott*, her brother,
 should give her husband more, apprehending, from the
 strongest circumstances, that his ill usage was the
 occasion of her death; or that the said *Thomas Scott*,
 who was a man of the greatest probity and discretion,
 should keep this pretended bond concealed in his cus-
 tody for upwards of 30 years, and leave it to raise
 discord in his family after his death; and that *Thomas*
Scott frequently said he had paid his sister *Winifred*'s
 portion to a farthing, and often expressed his trouble
 and resentment for her ill usage by her husband: And
 that *Richard Pretty*, the first subscribing witness to the
 bond, was, on the day it bears date, near twenty miles
 distant from the place where respondent pretended it
 was sealed; and that there then was a great difference (oc-
 casioned by a law suit) between *Scott* and *Pretty*; And
 that all the pretended witnesses to the bond in question
 were dead several years before *Thomas Scott*, and before
 this bond was heard of; and that the name *William*
Lucas, set to the bond as a witness, resembled the hand
 of

of *William Lucas* senior; and respondent at the first trial applied his proof to prove his hand; but that it afterwards appearing that he died three years before the date of the bond, some remarkable letters therein were much altered, and all drawn over with fresh ink, before the second trial, to make it more like the son's hand, who was alive at the time of the date, and that the words (*sealed and subscribed*) although unusual and improper, were like what respondent himself had used in other instances; particularly in two bonds wherein himself was bound, which had been unpaid near twenty years, till being produced as evidence against respondent at the first trial, they were paid off and taken up before the second; and as to another bond, pretended to be made by *Thomas Scott* to one *Doleman*, in 1694, in the like phrase with that in question, and sent in a letter of the same hand, seal, and ink, dated *August* 22d, 1699, to a Mr. *Fox*, to be by him concealed till after *Thomas Scott's* death, as the letter imported; (a copy of which bond is subjoined to this case); appellant observed that soon after the death of *Thomas Scott*, respondent went to *Fox*, about ten miles distant, to examine a copy of the bond in question; and that there was good evidence that this bond and letter were of respondent's own writing; and that *Thomas Scott* was so old and infirm that he could not write at all, nor so much as hold a pen in his hand at the time when that letter was dated, which was signed *Thomas Scott*, exactly like, and written as well as the bond in question; and that respondent had been in different stories how he came by this bond, saying sometimes he found it amongst his father's writings, and sometimes, that *Thomas Scott* gave it him in 1694, being ten years after his father *Hilton's* death: And that the respondent had brought an action upon the bond in question in the Court of Common Pleas, and laid his venue in *Warwickshire*, and thereupon obtained a verdict; but that the court of Common Pleas not satisfied with it, directed a new trial; and that upon the second trial, upon proof of the before-mentioned, and many other matters and circumstances, after a trial of nine hours at *Warwick* assizes, in *August*, 1701, by a special jury of gentlemen of quality, and upon a full hearing of both sides, respondent having some notice that the jury had given a privy verdict against him, suffered himself to be non-suit: And that notwithstanding

ing this, respondent brought another action, and laid it in *Shropshire*, although *Staffordshire* were the adjacent county to *Warwickshire*, and the county wherein the cause of action arose, and the reputation of the parties and witnesses were only known; and that appellant had brought his bill in Chancery to discover the fraud, and to have the bond cancelled: To which bill respondent answering, many witnesses were examined on both sides, and the cause heard 1st *May*, 1702, when after opening the pleadings and nature of the evidence, the Lord Keeper did not think fit to enter into the merits, but directed a trial at law, in *Shropshire*. Whether this was *Thomas Scott's* deed or not, at the then next *Shrewsbury* assizes; and that preparations were accordingly made for trial there; but it appearing that attorneys, and twenty or thirty persons of greater interest in that county, had been industriously soliciting for respondent, before the assizes; and that papers had been dispersed by him, to prepossess the people of that county, appellant was, for these reasons only, advised not to try the merits then; and therefore insisted that the bond was not specified according to the act of parliament for taxing money at interest; and respondent was thereupon non-suit: And that appellant, for these reasons, applied to have the trial in some other county, particularly in *Staffordshire*, where the credit of the parties and witnesses was best known, all or most of them living there; but not prevailing, the cause was again tried at *Shrewsbury*; upon which respondent had a verdict for the said pretended bond; and thereupon the cause was heard in Chancery, 8th *May*, 1703, and the bill dismissed with 20*l.* costs. Whereupon respondent took out execution for the whole penalty of 1000*l.* and levied the same; but that upon a re-hearing, 27th *November*, 1703, that matter was rectified, and only the principal sum of 200*l.* with interest, and the 20*l.* without interest, ordered to be paid the 27th day of *January* last; and if not then paid, the same to be paid in a month after, with the costs of the last trial, to be taxed by a Master of the Court. And that at the hearing and re-hearing, appellant (having liberty so to do) moved for another trial, because there had been a non-suit, on full evidence, without any objection made on the respondent's side to the trial; and considering the last trial at *Shrewsbury* fair, there had been only verdict
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against verdict; and because *Doleman's* bond, and the letter of the 22^d of *August*, 1699, which were very material evidence, were not allowed to be read, or used, though they had been allowed at the former trials, and though evidence was then offered of their being respondent's writings, and not *Scott's*, and although at the first trial the matter of that bond and letter was insisted upon by respondent himself; and further, because respondent's witnesses varied materially from the testimony they gave at the former trials, which the appellant was not admitted to prove, because the record of the possea of the non-suit in *Warwickshire*, offered in evidence to prove the former trial, was disallowed as evidence, which by the rules of law had usually been allowed in such cases; and finally, because the judge who tried the cause had signed a certificate, wherein, in respect of the nature and length of the evidence, and that appellant had offered to try the cause at bar, and if it went against him to pay respondent bar-costs, and if it went for him to expect no costs at all; he submitted it to the consideration of the Lord-Keeper, Whether the cause might not deserve a re-examination by a trial at bar? notwithstanding all which the Lord-Keeper did not think fit to order another trial, or to enter further into the merits of the cause, or admit the appellant to read any proofs, but dismissed the bill as aforesaid; which dismissal appellant insisted ought to be reversed, and a new trial directed; because, as to the verdict at the first trial, it being set aside by the Court of Common Pleas, was never capable of being entered upon record, and so quite out of the case; and at the second trial respondent was non-suit upon full evidence; and that the third trial was not upon the merits, but went off only for want of a specification of the bond; and that the last trial was not upon the whole evidence, nor upon a full defence; and that in truth the many matters, evidence, and circumstances in this cause, were too long for the time allowed in a circuit at the assizes: And that the concern being of such value, near a thousand pound, and the reputation of the parties and witnesses being much at stake, appellant insisted that another and final trial should be granted at bar, by a jury of the county where the parties and witnesses were best known; and that this cause was as proper for such farther trial as other causes wherein more trials had been had, and lately in the cause of

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of *Wharton* and *Tily**, after several trials before had, upon a farther trial directed by the Lords, the bond then in question was proved a forgery.

1703.

J. Groves.

The respondent, in affirmance of the decree, stated: That *John Hilton* had married *Winifred*, sister of *Thomas Scott*, with whom he had 300*l.* portion, which he heard was not so much as was due to her, by whom he

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* 31st May, 1701. *Lords Journ.* vol. xvi. p. 714. Eq. Ab. 378. 2 Vern. 378, 419.

The following is the bond to *Dealman* referred to by appellant's

Case:

" To all christian people to whom these presents shall
 " come, greeting. I *Thomas Scott of Great Barr, in the parish*
 " *of Aldridge and County of Stafford, Gent.* being fully convinced, that through the instigation of some ill people that prevail'd with me to present a person to the parsonage of *Barr and Aldridge*, contrary to the intent of my loving kinsman, *Nathaniel Dealman*, late rector of the aforesaid *Barr and Aldridge*; that I the said *Thomas Scott*, in so doing, have greatly injured the heirs of him the said *Nathaniel Dealman*: Wherefore, having a free estate of my own, out of which I ever resolved to make full amends unto all persons whom I have any way injured; but being now far in years, and grown weak in body, I am so hardly dealt with, and so closely tended by some whom I shall forbear to name, that I cannot have the liberty to dispose of my estate according to my own will: And therefore I do here, in the presence of Almighty God, own and acknowledge myself indebted unto *Thomas Dealman*, son and heir of the aforesaid *Nathaniel Dealman*, the full and just sum of one hundred pounds, of good and lawful money of England, to be paid to the said *Thomas Dealman*, or his assigns, within six months after my decease, with due interest for the same from the day of the date hereof above-mentioned.
 " And for the true and just payment hereof, I the said *Thomas Scott*, Do, by these presents, firmly use, bind and oblige my heirs, executors, administrators, and assigns, and every of them in the penal sum of five hundred pounds, for the payment of the above-mention'd hundred pound, of lawful money of England: And in witness of the same, I have hereunto put this my own hand and seal, this ninth day of October, in the sixth year of the reign of our sovereign lord and lady, *William and Mary*, by the Grace of God, of England, Scotland, France, and Ireland, King and Queen, Defenders of the Faith, Anno Domini, 1694.

" THO. SCOTT."

1703.

he had no children: That *John Hilton* lived with *Thomas Scott* several years after his wife's death, and there was a great friendship between them; and that *Thomas Scott* having an estate of 500*l. per annum* in the county of *Stafford*, and 1000*l.* personal estate, and having no child, and the said *John Hilton*, after the decease of *Winifred*, having, with his approbation, married a relation of his, by whom he had issue respondent, said *John Hilton*, was, as respondent heard, in expectation that *Thomas Scott* would leave him a good legacy at his death; but that *Thomas Scott* was narrowly watched by appellant and his friends, to prevent his disposition of any part of his estate from them: And that respondent's father died in the life-time of *Thomas Scott*; and that *Thomas Scott*, in 1694, meeting respondent, told him he had something for him; and respondent visiting him soon after at his house, he privately delivered to respondent the bond in question, made in the year 1667, and directed him to keep it secret till after his decease, otherwise he should live but an uneasy life; which accordingly respondent did, save that he privately shewed it to some friends for their advice: And that *Thomas Scott* died about *March*, 1699, and the money six months after becoming payable, and appellant refusing to pay it, respondent employed an attorney of *Warwickshire* to put the bond in suit, which he did accordingly in *Warwickshire*; and the appellant pleading that the bond was not his brother's deed, after a trial of several hours a verdict was found for respondent; but there being great variety of proof on both sides, and the debt being very considerable, the judge was pleased to certify that upon payment of costs, it was fit the cause should be tried again. And that pending that suit, and before the second trial, appellant exhibited his bill in Chancery, to be relieved against the bond, unto which an answer was put in, and witnesses examined to perpetuate their testimony; and at the next assizes of *Warwick*, the cause came on to be tried a second time, and respondent being informed that appellant had unfairly retained a great number of attorneys in the solicitation and management of the same, who had made mighty application in his favour, respondent without attending the success of the cause became non-suit, and forthwith brought a new action in the county of *Salop*; but before the cause could be tried, appellant brought on his cause in Chancery to be heard, upon which the Court was pleased to direct

direct that the parties should proceed to try the cause in the county of *Salop*, being an indifferent county, though great endeavours were used to carry the cause into *Staffordshire*, where appellant had great interest and power; and the Court directed that the cause should be tried by a jury of gentlemen of quality of that county, and accordingly such a jury was returned; and the respondent on the trial produced a specification of the bond, but it not being exactly according to the act of parliament, although the duty was paid to the receiver, and appellant's council insisting thereon, respondent was for that cause only nonsuited; and upon application made by the appellant the next ensuing term unto the Court of Chancery, for the costs of that nonsuit, and respondent was forced to pay 5*ol.* costs before he could have a new trial: And that at a new trial had last *Leut* assizes for *Salop*, by a jury of gentlemen of great quality, a verdict was given for respondent, that the bond was the deed of *Thomas Scott*; and then the cause was heard upon the equity reserved, and appellant pressed for a new trial, which the Court, after two verdicts for the bond, refused to grant, and dismissed the bill with 2*ol.* costs: And that appellant petitioned the Court to rehear the cause, which was accordingly re-heard; and then again pressed for a new trial, which was again refused, but was relieved against the penalty of the bond: And that appellant, who was near eighty-six years of age, had appealed for delay; wherefore respondent insisted the decree of dismissal ought to be affirmed.

W. Banastre.

Die Martis, 29^o Februarii, 1703. After hearing council upon this appeal, it was ORDERED by the Lords that the decree, or orders, complained of, be reverted so far only as that a new trial should be had, touching the validity of the bond in question, upon a feigned issue, “Whether the writing in question be the deed of the intestate *Thomas Scott*,” in the *Queen’s* bench, at the bar, by a special jury of the county of *Middlesex* in next term: And that appellant should name an attorney, and be plaintiff in that action: And that respondent should produce the bond in question at the trial; and that the money decreed being 65*l.* 7*s.* 6*d.* and 2*os.* per month interest since 27th *January* last, should within fourteen days be brought into Chancery; which, if not done, or trial not proceeded on, or if on the trial verdict for respondent, then this appeal to stand dismissed, and

1703. and the decree affirmed; and the money to be brought in immediately paid to respondent: And further ORDERED, that if at the trial verdict for respondent, appellant should pay him bar-costs; but if for appellant, respondent not to pay any costs, as was offered by appellant's council at the bar.—*Lords Journ.* vol. xvii. p. 463.

N. B. It appears from the Journal, p. 581, that, 17th November, 1704, the money which had been brought into Chancery, pursuant to the Lords former order, was ordered to be paid out to appellant, the respondent (as there expressed) so consenting.

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The Royal African Company of }
England, - - - Appellants.

William Dockwra, and Roger }
Langdon and Phillis his } Respondents.
Wife, Administratrix of }
Richard Dickenson, }

THE appellants made this case: That they were incorporated by charter from the Crown, and had thereby a grant of the trade to *Africa*, exclusive of all others, with power to seize on all ships and cargoes which should presume to trade thither without their licence, and to dispose thereof, reserving one moiety to the Crown; and that his late Majesty King *Charles* the second, to enable the company better to carry on their trade from time to time, sent one or more ships of war to the coast of *Africa*, to take all ships found trading there other than the company's, and to deliver them to the company's factors there; and that in the year 1676, Captain *Richard Dickenson*, commander of the *Hunter* man of war, by virtue of a commission from the King so empowering him, took the ships *Ann*, and the *John* and *Martha*; and that those ships with their cargoes were condemned by the admiralty, and amounted in value to 2800*l.* of which the company paid 1400*l.* to his Majesty, and 700*l.* to Captain *Dickenson*; who, twenty years after, *viz.* in 1696, exhibited his bill in Chancery against the company and respondent *Dockwra*, complaining that *Dockwra*, pretending himself owner of the *Ann*, and her cargo, had recovered 2630*l.* 12*s.* against him in an action of trover, for the *Ann* and her cargo, and that he was not able at the trial to produce an authentic copy of the condemnation and seizure, and that he only acted under a commission from the King *Charles* in pursuance of the *Guinea* company's charter; and that the ship and cargo was condemned by a Court of Admiralty, and that he delivered them to the company's agent; and prayed to be relieved against the verdict: And that *Dockwra*, by his answer insisted on his verdict, and knew of no such instructions or condemnation, and that *Dickenson* was a wrong doer, and the charter a monopoly

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monopoly and illegal; and that he would have sued sooner, but that *Dickenson* was sheltered by King *Charles*, King *James*, and by a commission from King *William*, and that he proceeded as soon as he could without offence to governments; and admitted one *Nightingale* was owner of five sixteenth's of the ship and cargo, which *Nightingale*, appellants shewed, was no party to the suit; and that appellants had by their answer insisted on their charter, and that King *Charles* had sent *Dickenson* to the coast, and conceived his instructions sufficient to justify his actions, and denied that they ought to indemnify him, and that this was twenty years ago, and few or none of the company then living; and that Captain *Dickenson* died, and his wife and administratrix married respondent *Langdon*, and revived the suit; and upon the hearing the Master of the Rolls dismissed the bill as against *Dockwra*, but decreed appellants to pay the whole money recovered against *Dickenson* to the other defendant *Dockwra*, and that *Dockwra* should be admitted to prosecute the said decree against the appellants in the name of *Langdon* and his wife: And that appellant's estate was sequestred, and they forced to pay the 263*ol.* 12*s.* to the commissioners named in the sequestration, which was since paid to *Dockwra*: And appellants complained that they were aggrieved by that decree, because they contended the bill ought to have been dismissed for want of proper parties; *Nightingale*, and others who appeared to be entitled to part of the ship and goods, and who had since exhibited their bill against *Dockwra*, and appellants to have their proportion: And that the Attorney General ought also to have been a party, because the validity of the grant from the Crown to appellants was in question, and because of the moiety paid to the Crown; and that if even *Dickenson* had any equity against appellants, they ought not to be bound by the verdict and damages, they not being parties or privy to the suit, especially as it appeared that *Dickenson* had not made as good a defence as his case was capable of: And further, that *Dockwra* ought not to have been relieved at all, because he well knew that such captures were in those days as often made as such ships could be met with, and adjudged legal, and that all parties concerned traded upon such hazard, and acquiesced under such captures, and that *Dockwra* himself took the law to be such in those days, and never thought of relief till

till 1696, above twenty years after; and that appellants stock and trade was now upon a new foundation, by virtue of a late act of Parliament; and that the additional stock, and new adventurers, were likely to be charged with these stale transactions, though they had come in upon the new establishment; And finally, that though appellants were liable, they ought to answer for no more than came to their use; and that *Dickenson* ought not to be discharged from the 700*l.* appellants paid him, nor ought appellants to be charged with the 1400*l.* they had already answered to the Crown.

J. D'A-
dal.

The respondent *Dockwra* on his part stated, that the Royal *African* company upon application to King *Charles* the second, to be accommodated with a man of war, (pretending the same necessary to countenance and protect their trade) obtained from his Majesty that the *Hunter*, then under the command of the said *Richard Dickenson*, should, at appellants charge, put to sea, and proceed to the coast of *Guinea*, with instructions proposed and contrived by appellants, that if he should find any ships stopping or trading on the coast of *Africa*, he was to endeavour to speak with them; and if he should find any subjects there, not freighted by appellants or by the *Gambia* adventurers, he was to seize and carry them to *Cape Corso Castle*; and that neither the captain, nor any of the officers, or ship's company, were to carry goods or merchandize for trade, but were to bring home all such gold as appellants agent should put on board: And that by these this ship was put into a state of war against all *English* subjects on the coast of *Africa*, except appellants and *Gambia* adventurers, whilst in peace with foreign traders; so that a *French* merchant was to be treated as a friend, whilst an *English* merchant was to be treated as an enemy; And that soon after the man of war arrived on that coast, the *Ann* and her cargo, whereof respondent was the greatest owner, but one *Jeffery Nibthingale*, since deceased, had part with him, was seized by the captain on the coast of *Africa*, and delivered over to the appellants agents; the prime cost of the ship and cargo in *London* being 2630*l.* 12*s.* and that appellants had made above *per cent.* of the cargo, and had ever since detained same, and had the benefit thereof in trade above twenty years; and that *Dockwra* and *Nibthingale*, upon notice that the ship and cargo had been unlawfully seized, complained

1703. { complained thereof, and made all fitting applications to obtain restitution from *Dickenson*, who thereupon absconded, and applied to his said majesty for protection, who in council declared he expected appellants should forthwith indemnify *Dickenson* from any suits for seizing the ship; and that if they refused, his Majesty would not in future employ any of his ships in their defence: And that *Dockwra*, in 1695, got *Dickenson* arrested (*Nightingale* being then dead) in an action of trover, and brought it to trial before Lord Chief Justice *Holt*, and upon full evidence, after a vigorous defence, obtained a verdict for 263*ol.* 12*s.* being only the prime cost of the ship and cargo; and having entered up judgment thereon, *Dickenson* filed his bill as stated by appellants; and that an injunction obtained in that cause after all possible opposition, was at last dissolved; and *Dickenson* being arrested in an action brought on the judgment, died insolvent, and a prisoner in the *Fleet*; after which respondents *Langdon* and his wife, *Dickenson's* administratrix, having revived the said suit, and the cause was heard 3d November, 1701, and as against the respondent *Dockwra* the bill was dismissed with costs, but as against the appellants, who, at the hearing, for delay, made default, it was decreed that they should pay (or repay) to *Langdon* and wife 263*ol.* 12*s.* and the costs at law and in Chancery, unless cause upon the return of a *Subpœna*, with which they were served, and again making default, the decree was, 4th December, 1701, made absolute, and signed and inrolled; yet upon the importunity of appellants, and their offer to give security to perform the decree, the inrollment was so far laid open, as to admit them to a re-hearing; and (after ten several orders about the security, and sundry pretences for putting off the cause) it was re-heard by the Master of the Rolls; who, and after mature deliberation, confirmed the former decree: And that the 263*ol.* 12*s.* had since been recovered and paid by *Langdon* and wife to *Dockwra*, on his acknowledging satisfaction on the record of the judgment against *Dickenson*, which decree respondents insisted ought to be affirmed by the Lords, because the equity of the bill as against appellants was, that they had the benefit of all that was seized by *Dickenson* their servant; and that *Nightingal's* executor was not a necessary party, be-
cause

cause the property of the ship and cargo was wholly in *Dockwra*, and so had been determined at law; and that the bill was brought only to be indemnified against the recovery by *Dockwra*; and that the recovery at law was the measure of the damage, against which appellants ought to indemnify *Dickenson*, whom appellants had refused to defend; and therefore any omission in his defence was to be charged to appellants; and that the prerogative was in no sort in question; and if any money was answered to the Crown by appellants, which ought not to have been answered, they had their proper remedy, which Captain *Dickenson* could not have in any manner: And that although the bill was dismissed as against *Dockwra*, yet there was a good ground for relief against the company, and if *Dockwra* was willing to stand in their place as to the relief given to *Dickenson*, by such means the relief became effectual to *Dickenson*, who thereby was eased from a most adversary suit; and that it was the most effectual course *Dockwra* could have for what he had recovered; against *Dickenson*, who was to be indemnified by the company, and died in prison and insolvent; and that this was most equitable and agreeable to the course of Chancery in like cases: And respondent insisted, that the now members of the company represented their predecessors as to all benefit of their stock and trade; and therefore ought to pay their predecessors debts, and that the body politick and its stock is still the same; and that the new privileges given by act of parliament, only made it the more solvent, and better able to pay its debts: And that appellants were not intitled to any allowance for the 700*l.* paid *Dickenson*, because that money was paid to him for his service to appellants for other matters, *viz.* bringing home their gold, and in pursuing their directions during his whole voyage, and as a compensation for his being retrained from trade, as the P. Crew appellants intimated when they borrowed the *Hunter* from his Majesty.

Die Sabbati, 4^o Martii, 1703. After hearing Prec. Ch. council on this appeal, it was ADJUDGED by the Lords 221. Vin. that the same should be dismissed, and the decree and iv. 402. orders complained of affirmed; and that the Royal xv. 316. *African* company should pay respondent *Dockwra* 30*l.* for his costs. *Lords Journ.* vol. xvii. p. 470.

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1703.
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The Queen,

Plaintiff,

William Weedon Ford,

} in Error.

Esq. Warden of the } Defendant,

Fleet, - - - - - }

Case 64. **T**HE Plaintiff in error stated, that in *Hilary* term 1699, a transcript of the record in Chancery of an inquisition, finding a forfeiture of the office of warden of the *Fleet*, and traverses thereof was delivered into the *King's* bench by the proper officer, in the name of the Lord Chancellor, with a *Venire facias* annexed, issuing out of Chancery of the *Michaelmas* term before returnable in the *King's* bench in *Octab. Sti. Hilarii*, viz. the 20th of *January*, with a panel of a jury returned by the Sheriff of *Middlesex*, to try the several traverses joined in Chancery: And that by rule of Court, the 10th of *February*, 1699, a trial at bar was appointed the then next term; and that the said *Venire facias* was quashed and vacated as irregular, and one awarded *de novo* by the Court of *King's* bench to try the several issues joined; and that this was done by consent of all parties, and so appeared by express words in the record itself; but by the delays of the respondent, the trial could not be had in *Easter* or *Trinity* term next following: And that in *Michaelmas* term 1700, the trial at bar came on, and a verdict was given for the Crown, after full evidence and examination of the cause; and that though the right of the cause was thus found against the respondent, he in *Michaelmas* term last had obtained judgment, that the plea to the inquisition, and the process thereon, were discontinued, and thereby the trial and verdict avoided and made ineffectual: And Colonel *Baldwin Leighton*, on whose behalf this writ of error was brought, stated that the matter of the discontinuance stood thus: That the *Venire facias* out of Chancery, bore teste in Chancery in *Michaelmas* term before, and was returnable in the *King's* bench in *Octab. Sti. Hilary*, viz. the 20th of *January*; and that in the memorandum or preamble of the roll, made up by Mr. *Harcourt* the attorney in the Crown-office, the proper officer for that

that purpose, it was entered, that the said transcript was delivered into the King's bench by the hands of the Lord Chancellor the third day of *February*; and so the objection was, that it did not appear where the record was from the 20th of *January* to the 3d of *February*, and so a discontinuance; and appellant referred to a certificate from the petty bag, to show that the record was always delivered after the return of the venire; and stated that the questions for the Lords would be these. First; whether a discontinuance or not? and appellant insisted that there was no discontinuance. Secondly; if a discontinuance, from whence it arose? whether from any default in the prosecutor or agents, or the officer of the Court, whom the prosecutor was bound to trust to in that matter? And if from the neglect or omission of such officer, or any acts of the Court, appellant insisted that the suitor ought not to be prejudiced by it; but it ought to be amended and rectified by the Court. Thirdly; if a discontinuance from either, whether amendable? And in this case appellant insisted it was law by amendable; and referred to the copy of the record, wherein test. *Die Feb.* was struck out by prosecutor's council; and S. Dodd afterwards put upon the roll by Mr. *Harcourt*.

The defendant on the other hand stated, that the office of warden of the *Fleet* was an ancient office of inheritance, held by several grants from the Crown, and was conveyed to the warden in trust only, to enable him by law to execute it, and was subject to several mortgages and securities; and that the equity of redemption, and the inheritance for ever, is conveyed, by virtue of an act of Parliament to a purchaser, upon a valuable consideration: And that in the second year of their late Majesties reign, Mr. *Leighton*, upon a suggestion that the office was forfeited by *Mandore*, the then warden, procured a warrant for a grant thereof to himself, but that the inquisition upon which the same was grounded, was declared illegal by the then Lords Commissioners of the Great Seal, assisted by Lord Chief Justice *Holt* and other judges; and so the grant had never passed the Great Seal; and that Colonel *Leighton* had made several attempts afterwards to maintain his pretensions to the office, which were looked upon as frivolous, and nothing was done upon them, though it put the proprietors of the office to a considerable

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² Salk.
469.

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considerable expence in the legal defence of their title, for which they had had no recompence: And that notwithstanding all this, 26th February, 1697, *Leighton* procured another commission to enquire into the forfeiture of the office (*Ford* being then warden) suggesting that he had voluntarily suffered *Richard Spencer*, and three other persons, to escape, and had received 20 guineas for the escape of *Spencer*; and that the inquisition being returned into the Petty-bag office in the Court of Chancery, *Ford* appeared and pleaded, and denied the facts; and that these proceedings were continued by an entry upon the record by the prosecutors agents, by a day given to the parties to appear in the Court of *King's* bench in *Ostabis Hiarii*, being the 20th of *January*, *Undecimo Regis*: But that the record itself was not transmitted or delivered into that Court till 3d February following; so that the parties, according to the rules of law, had really no day whereupon they could appear in the *King's* bench, and consequently were never parties in that Court, nor the record ever there, but, according to the rules of law, yet remained in the Court of Chancery undetermined upon the issues joined, and the other pleas and proceedings there; and that this error not being observed, a trial was had at bar the 25th of *November*, *Duodecimo Regis*, and *Ford* acquitted of all the escapes saying only *Spencer's*, and was also acquitted of receiving the 20 guineas for *Spencer's* escape; and that the debt for which *Spencer* was committed was satisfied before the inquisition taken: And that there had been no evidence to prove the escape of *Spencer* but one *Emerson*, a bailiff, twice convicted of felony, and who swore since found guilty of perjury for what he swore on this trial; and that this very *Emerson* had been bound in an obligation to *Ford* of 600*l.* penalty, conditioned that *Spencer* should not escape, and that *Ford's* council had objected that he was not competent to prove the escape of *Spencer* to be voluntary in the warden; but that this objection being over ruled, *Ford* prayed his bill of exceptions according to the act of Parliament, which was allowed and ought to be made part of the record: And that after the trial *Ford* offered several matters in arrest of judgment, which had great weight with the Court, but that no opinion was yet given upon them, because in *Michaelmas* term last the Court took notice of the mistake aforesaid, and

and that the record was really never before them, but totally discontinued and remaining undetermined in the Court of Chancery; and gave judgment that *Ford's* plea, and all the proceedings thereupon were discontinued, and *Ford* now insisted upon the judgment of discontinuance; and that the discontinuance appeared so palpably upon the record, that the Court of *King's* bench could not give any other judgment; and that the Lords had never varied the known rules of law, because of the dangerous consequences which might attend a precedent of that kind; and that in case of continuance of records, the courts of law were bound to be very exact; because the continuing them regularly before them was their only authority to proceed; and that the present case was much stronger than usual, it being a transmigration of a record from one Court to another; and in criminal cases and forfeitures, the Courts of justice had most special regard to forms of law, because of the fatal consequences happening to persons accused; and respondent submitted, that no case before the Lords ever deserved more compassionate consideration than this; and that the Lords ought to let the respondent have all the benefit the law had given him, since all the equity, justice, and right of the question, was entirely with him, because it was a verdict given upon the evidence of a single person, who ought not to be credited as a witness for his former convictions for felony, in stealing a silver tankard, and for manslaughter; and that what he swore in this matter had been since, in point of law, falsified, by his conviction of perjury in the very thing sworn, besides his swearing to acquit himself of his bond; so that if the strict rules of law had been against *Ford*, his case seemed to require favour and compassion; and he submitted, that even after a decree, or judgment, affirmed in Parliament, if the person upon whose evidence such decree or judgment was grounded, were convicted of perjury for such evidence, the party aggrieved had obtained relief against the same: And contended further, that this inquisition and intended forfeiture was to affect the right of several innocent persons, for a supposed offence committed by *Ford*, of which it was plain he was no way guilty, and to give it to a third person who had no right but what he had created to himself by the oath of a profligate fellow, after begging a prosecution of a forfeiture for his

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his own benefit, contrary to law: And that even supposing the fact true, it appeared by the record *Ford* took nothing for it; and the plaintiffs in the original action, were satisfied before the inquisition taken: And that it would be unprecedented, to make a man forfeit his office for doing an act which was no injury either to her Majesty, or any of her subjects, nor any benefit to himself: And that the Lords had upon reading *Ford's* petition for receiving the bill of exception, the 28th of *February* last, intimated their judgment to be, that this writ of error was only upon the judgment of discontinuance; and submitted that in a case thus circumstanced, the observing and holding unto the strict rules of law, could not be thought a hardship to the prosecutor, when all equity is against him.

Journ.
xvii. p.
451.

St. John
Broderick.

Die Martii, 7^o Martii, 1703. After hearing council to argue the errors assigned upon this writ of error, it was ADJUDGED by the Lords that the judgment given in the Court of Queen's bench should be reversed, and the record remitted to that Court; and that the Court should proceed as if no such judgment of discontinuance had been given, but should give judgment on the merits of the cause, and in order thereto, that the record should be amended, and made as delivered the first day of term. *Lords Journ.* vol. xvii. p. 475.

It appears from the journal, that another writ of error in parliament was brought by *Ford*, 13th *November*, 1704; and that *Ford*, 20th *November*, petitioned the Lords, that Lord C. J. *Holt*, and Justice *Gold*, before whom he had upon the late trial prayed a bill of exceptions, on account of the inadmissibility of a witness examined for the Queen, might attend to acknowledge their seals to the bill of exceptions, and that they were accordingly ORDERED to do so; and that on the 24th *November*, the Judges accordingly attended, and acknowledged their seals; and that *Ford* afterwards, 19th *December*, withdrew his writ of error, and prayed that the judgment of the Queen's bench for her Majesty might be affirmed, and it was so. *Journ.* xvii. p. 577, 582, 585, 605.

Sir

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1793.
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Sir Henry Parker, Baronet, and John } Appellants.
Durbam, his Under-Tenant,

James Stillingfleet, Clerk, Respondent.

THE appellants made this case: That *Edmund, Case 65.*
bishop of *Worcester*, 13th November, 31 Eliz.

demised to the Queen the site of the manor of *Tredington*, in the county of *Worcester*, and divers lands there (called *Tredington farm*) of the yearly value of 140*l.* to hold from the determination of such estates thereof as were then in being, for the term of 90 years at the rent of 10*l.* which lease by mesne assignments came to the *Sheldons* of *Boeley* in *Worcestershire*, who held it till 1676; and that the estates in being at the time of the making the lease by the bishop determined in 1642; and that the lease for 90 years then commenced, and would not determine till 1732; and that appellant *Parker*, in 1676, purchased the lease from the *Sheldons* for 2950*l.* there being 54 years unexpired; and that the writings of the *Sheldons* had been burnt at *Boeley* house in the time of the late wars, and Sir *Henry Parker*, before he completed his purchase, applied to the then bishop of *Worcester* and his officers, to know the certain commencement of the term, and had a certificate from *Mr. Price*, the bishop's secretary, that it appeared by a survey taken in 1647, and then registered at *Worcester*, that the lease for 90 years commenced in 1642: And that Sir *Henry Parker* thereupon proceeded in his purchase, and paid his purchase money, and entered upon the premises, and quietly enjoyed till 1692; and at that time the late bishop *Stillingfleet*, finding an entry of a lease of the premises made to one *Freeman*, which determined in 1607, and which appellant stated never had had any possession with, or rent paid under it; and supposing that to be the estate in being at the time of the granting the lease for 90 years, concluded that the 90 years commenced in 1607, and consequently would determine in 1697; and thereupon granted a concurrent lease to one *Pedley* his trustee, and then preferred a bill in Chancery against appellant Sir *Henry*, to have a discovery of his deeds and writings; to which bill he pleaded that he was a purchaser

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chafer for a full and valuable consideration; and that
 plea upon argument before the late lords commif-
 sioners was allowed, and no further proceedings had in
 that court, and the bill since dismissed; and that the
 lease to *Pedley* was afterwards surrendered, and the
 bishop made a lease to respondent his son, in trust for
 himself: And respondent, in 1698, in the name of *John*
Underbill, his feigned lessee, brought an ejectment against
 appellant *Durham*, Sir *Henry's* under-tenant, in
 the King's bench, which was tried at bar in *Michael-*
mas term, 1699; and that the only question was con-
 cerning the commencement of the lease for 90 years.
 respondent's council insisting that it commenced in
 1607, upon the determination of the lease to *Freeman*;
 and that Sir *Henry* complained that he, had no no-
 tice of the evidences which were in the bishop's or
 respondent's custody, and so was disabled to make de-
 fence, and that a verdict passed against him, and judg-
 ment was obtained, and possession had thereupon; and
 that since bishop *Stillingfleet's* death, which happened a
 short time after that trial, Sir *Henry* had found amongst
 the evidences of the bishoprick divers rolls of bailiffs
 accounts in the reigns of *Q. Eliz. K. James* the 1st
 and *K. Char.* the 1st. whereby it appeared that the rent
 of 10*l. per annum* was answered and paid by one
Katherine Hornvold, who had a lease of the premises
 since the lease to *Freeman*, and before the lease made to
Queen Elizabeth, and that such payments of rent
 continued for 40 years together; and Sir *Henry Parker*
 and his council were thereby satisfied that he had above
 30 years to come of his 90 years, and thereupon brought
 his ejectment against respondent, and tried the same at
 the bar of the Common Pleas in *Easter*, 1701, and
 obtained a verdict upon full evidence on both sides, and
 had judgment: And that respondent notwithstanding had,
 after the trial in the King's-bench, brought an action of
 trespass in the name of *Underbill*, his feigned lessee, against
Durham for the meane profits, and obtained judgment
 therein in *Easter* term, 1701, and a writ of inquiry of
 damages was awarded; and that appellants were stopped
 by the verdict in the ejectment, to make any defence
 at law in that action, and therefore exhibited their bill
 in the Exchequer against the respondent, to have a dis-
 covery of the rolls of the bailiffs accounts, and evidences
 in his or his father's custody, at the time the suit was
 depending in the King's-bench, and for an injunction
 against

against the action of trespass for the mesne profits, he having then about 30 years to come of the said 90 years : And that respondent in his third answer (two former being insufficient) confessed that the first knowledge he had of the said bailiffs accounts was about five or six weeks before the trial in the King's-bench, and said he did not think it material for him to give appellants notice thereof. And in a former answer he acknowledged that some of those bailiffs accounts were brought up to the trial in the King's bench, and that he proposed to Mr. Price (who brought them up at his request) to take notice thereof in his evidence there, if occasion offered, though appellant or his council had not the least intimation thereof, and so could not make any use of the same : And that the cause in the Exchequer was heard 18th June, 1703. before three of the barons, and one of them was of opinion that appellants ought to be relieved ; but two other barons being of a contrary opinion, the appellants bill was ordered to be dismissed, which order appellants insisted ought to be reversed, and respondent injoined from proceeding against the appellants for the mesne profits, the lands appearing to be appellants own estate, and so affirmed by a solemn trial at the Common Pleas bar, and more especially, Francis Brown. R. Freeman. as at the time of the former suit in the King's-bench the material evidences of the appellants title were concealed from the appellants by respondent or his father.

The respondent on the other hand stated, that it was agreed by all parties, that the last term for years which was granted of the estate in question, was granted by a grand lease, called *Lopez lease*, dated 13th of November, 31st Eliz. for a term of ninety years, to commence from the determination of all former leases and estates thereof granted by any precedent bishop ; and that it was equally agreed that appellant, Sir Henry, was intitled to the remainder of this term of ninety years, and that the reversion and inheritance belonged to the bishoprick, and that the real question was whether the term of 30 years were yet determined, and when ? And respondent stated, that that question depended upon this ; what former lease or estate was in being when the term of 90 years was granted ? And respondent insisted, that upon searches in the books of the prior and convent, dean and chapter and bishop, it appeared that the only lease then in being was a lease made by bishop *Sylvester*, 23d Henry VII. to one *Freeman*, for

for 99 years, to commence from *Michaelmas*, 1508, and that that term expired at *Michaelmas*, 1607, and that consequently the term of 90 years granted by *Lopez* lease expired at *Michaelmas*, 1697, and that thereupon the late bishop *Stillington*, having for several years before in vain pressed Sir *Henry* to renew, granted a lease for 21 years thereof to respondent his son; and that appellants would have it presumed without any ground, that the lease to *Freeman* was surrendered, and relied upon a copy of a survey, supposed to be taken in the year 1647, by commission from the then usurped powers (which copy was remaining amongst the evidences of the bishoprick) wherein it was mentioned, that the estate in question was then held by *William Sheldons*, and that the last copyhold tenant died about five years then before; and that there was then to come of the term of 90 years, granted by *Lopez* lease, about 85 years: But respondent insisted that no such survey was extant, and that though it were, it was no evidence against the church, much less the copy which appeared to be imperfect; and that the commissioners who took the survey were imposed upon by the tenants; and that there were many falsties and mistakes, and particularly in calling the estate in question copyhold; and therefore, till lately, he had depended upon a fiction without proof, viz. that it was a common error in the surveys of crown and church revenues to call leasehold copyhold; and also, that the life mentioned in the survey to be lately dead, was the life of one *Edward Sheldons*; and that the estate had been held by a lease made by the bishop for his life only, or by a lease for two lives, whereof *Edward Sheldons* was the survivor; and that appellant finally relied upon some ancient bailiffs accounts, wherein it was mentioned that the estate in question *dimiss' per indentur' Catherine Horniold*, without any further words to explain it, which appellant would interpret to be some lease made by the bishops to *Katherine Horniold*; and that *Horniold* was but a trustee for the *Sheldons*, from whom the appellant bought this estate: But respondent insisted that all this, as to *Horniold's* being a trustee, was fiction without proof; and that the estate in question, from the time of making *Lopez* lease till appellant purchased in 1675, was constantly in the possession of the *Sheldons*; and that *Lopez* lease expressly mentioned that the estate in question was then held by the *Sheldons* by virtue of a lease for years, and insisted that this could be no other but the

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the lease for years to *Freeman*, and destroyed the pretensions of a lease for one or two lives; and moreover that *Lopez* lease happened to be forfeited to the crown, and granted out again by the crown in 10 *Charles* 1st. for the residue of the term of 90 years; so that if the term of 90 years was then begun and partly spent, that was a direct falsification of the survey: And that respondent obtained a verdict on his ejectment upon full evidence, and that the court and jury were satisfied that appellants term for 90 years was determined: And respondent stated further, before bishop *Stillingfleet* died, appellants had brought a bill in equity against him, and respondent his son, and *John Price*, Esq. chancellor of the diocese, formerly chapter clerk, who all denied they knew of any evidences or writings that made for appellants advantage, and believed the lease to *Freeman* for 39 years was not surrendered, and was the only estate in being at the making of *Lopez* lease; and the bishop particularly said, he had given directions that all searches should be made for the discovery of every thing either for his advantage or disadvantage, and offered appellants free liberty to inspect all evidences and writings; and said that upon search in the Exchequer, it appeared an answer of *Mr. Sheldon*'s was missing, and, as he believed, taken off the file; and that several years before his answer, when *Price* acquainted him he had found out *Freeman*'s lease, he gave notice thereof to appellant, and desired him to satisfy himself therein, and offered to renew; and again, by his answer, offered to renew to appellant, and take a less fine than usual: And respondent observed that before that trial at barr appellants had a rule of Court that the bishop and his officers should permit him to search the evidences of the bishoprick, and should produce at the trial such as the appellants desired; and that some few weeks before the trial, respondent being informed that there were some bailiffs accounts which mentioned the matter of *Katherine Harniold*, desired the present bishop's officers to bring up the same to the trial, and that accordingly some of those accounts were then brought into Court, with the other evidences of the bishoprick; and that *Price* being examined as a witness for appellants, particularly mentioned the said bailiffs accounts, and what he found therein concerning *Katherine Harniold*: And respondent stated, that he did not take possession upon his verdict, because the estate

{ 1703. }
 estate was then in possession of appellant *Durham*, who rented the whole from Sir *Henry*; And that Sir *Henry* after that trial at bar, delivered declarations in ejectment in the Common Pleas to *Durham* his own tenant, upon which he was sure to get judgment by default, and so turn respondent out of possession: And that respondent therefore obtained a rule, that he himself might be made the only defendant in that ejectment, and might have a trial at bar there; which was accordingly had in the absence of the chief justice, and appellant had the good luck to get a verdict, and that had he previously brought an action of trespass for the mesne profits, as stated by appellant, and, after several dilatory pleadings, obtained judgment upon a demurrer argued by council on both sides, and took out a writ of enquiry of damages: And that appellants so far submitted to make their defence in the action for mesne profits, as to obtain a rule in the King's-bench (after they had got their verdict in the Common Pleas) that the writ of enquiry should be executed before the judges of assizes for *Worcester*: But then, for further delay, appellants brought a bill in the Exchequer against respondent: And that respondent in his answer denied appellants suggestions, and that appellants made no proof thereof: And that respondent being obliged to answer by commission, appellants got a general injunction, whereby the respondent was hindered not only from proceeding in the action of trespass, but from bringing any new ejectment to recover the estate; and that the Court had, on hearing, dismissed appellants bill with moderate costs: And respondent insisted such dismissal was just, and ought to be affirmed; for that the Court of equity, could not inquire into, or examine upon what evidence the verdicts in either of the trials at bar were obtained, nor hinder respondent from recovering the mesne profits, which by law were his right, and but a consequence of his verdict, because it would be in effect to falsify and disparage that verdict, and to try the cause over again: And Sir *Henry Parker* was a wary man, and a good lawyer, and should not have trusted to the survey, but have used better means to have satisfied himself, and should not have bought any thing under *Lopez* lease, which contained in the whole about 48 copy-hold, and 21 lease-hold estates (being a considerable part of the revenue of the bishoprick) and that that lease was in its creation a great prejudice to the church.

W. Do-
bynz.

Dis

Die Veneris, 10^o Martii, 1703. After hearing council on this appeal, it was ADJUDGED by the Lords, { 1703. } that the decree or order of dismission complained of should be reversed, and that the bill should be retained in the Exchequer; and that if *James Stillingfleet* should not bring a new ejection, and try his title to the lease in question before the end of *Michaelmas* term next, that then the court of Exchequer should grant a perpetual injunction against the action of trespass for mesne profits: And that upon the event of the trial, the court of Exchequer should give such directions as should be just; and that the former injunction should continue in the mean time. *Lords Journ.* vol. xvii. P. 477.

Christopher

1703. { *Christopher Priffick*, Merchant, and
James Oades, Gent. Administrators of *John Hubbuck*, late of
London, Upholsterer, } Appellants.

Robert Vignes, Executor of *John Vignes*, deceased, } Respondent.

Case 66. **T**HE appellants stated: That *John Hubbuck* had been an upholsterer in *London*, in great credit, by a retail trade and foreign traffick, and entrusted divers persons with considerable parcels of wares, for which they became debtors to him, and occasionally borrowed money on securities, and took up wares upon trust, and thereby contracted many debts: And that the appellant *Oades* lent *Hubbuck* 300*l.* upon his single bond of 600*l.* and that all interest was paid thereon to 8th *September*, 1694, and 10th *October* following, 100*l.* of the principal; soon after which, viz. in the beginning of *March*, 1694, *Hubbuck* died intestate, indebted to the appellant *Oades* 200*l.* as aforesaid; to appellant *Priffick* 50*l.* and upwards, a book debt; and to other persons other sums, partly by specialities, but for the most part upon simple contract only; leaving several young children unprovided for: And that at a general meeting of all the creditors, notified by public advertisement, in *May*, 1695, appellant *Oades*, as principal bond creditor, and appellant *Priffick*, as a near kinsman, were made choice of by the majority of creditors to obtain letters of administration of the intestate's estate, in trust for themselves and all other the creditors; and that, 4th *June*, 1695, administration was accordingly granted to appellants, who within three months exhibited into the Prerogative an inventory of all the household goods, and stock, amounting to 283*l.* 19*s.* 7*d.* and soon after duly administered the same according to law, in the expences of the administration, and in payment of bond debts only, whereof that of appellant *Oades* was principal: And that in *Michaelmas* term, 1697, one *John Vignes* exhibited a bill in *Chancery* against appellants, and also against *William Hester*, son and heir of *William Hester*, deceased, thereby setting forth that, 3d *September*, 1688, *John Hubbuck* and *William Hester* borrowed 100*l.* of him, and for security became bound in a bond of 200*l.* and that, 4th *September*, 1693, *John Hubbuck*

1703.

Hubbuck borrowed 50*l.* more of him on his single bond of 100*l.* penalty: And that *William Hester* the father made his will, and *William Hester*, his son and heir, sole executor, and died seised and possessed of a great real and personal estate: And that appellants, *Hubbuck's* administrators, refused to pay *Figures* his said several debts, and prayed a discovery from *William Hester* of his late father's estate; and from appellants of their intestate *Hubbuck's* estate, and to have his debts thereout paid: And appellants answered, that they had taken the administration as aforesaid, but that appellant *Oades* never intermeddled farther save by disbursing some petty charges thereout, and that *Prissick* was the sole acting administrator, and had paid appellant *Oades* his said bond debt, so that his demands were well nigh satisfied, and he submitted to assign his said administration; and that appellant *Prissick* set forth a schedule of all his receipts and payments, whereby it appeared that his receipts amounted to 894*l.* 5*s.* 7*d.* and his disbursements touching the administration, and in the payment of bond debts only, to 888*l.* 7*s.* 5½*d.* so that there then remained in his hands (his own simple contract debt being wholly unsatisfied) only 5*l.* 18*s.* 1½*d.* but annexed another schedule to his answer of debts, standing charged in the intestate's books as owing to him, amounting to 1019*l.* 11*s.* 7*d.* supposed to be desperate; and that no witness had been examined in the cause; but appellant obtained an order to examine witnesses, *viva voce*, at the hearing to prove his bonds; and the cause was heard at the Rolls 28th of *October*, 1698, when the appellants did not attend, but *Hester* did and made his defence, and a decree was pronounced, that it should be referred to Sir *John Heskins*, one of the Masters, to compute what was due for principal and interest on the bond entered into by *Hubbuck* alone, and to tax plaintiff his costs, which appellants were ordered to pay; and that *Figures* and *Hester* should proceed to a trial at law, and after such trial had, each to come back upon the equity reserved; and that soon after the hearing *Figures* died, leaving respondent his executor, who exhibited his bill of revivor, and that all proceedings were by an order *ex parte*, 9th *March*, revived; and that it was farther decreed, appellants should pay respondent what the master should report due for principal, interest, and costs: And appellants complained that the decree had been inrolled, being but thirteen days after this *ex parte* order pronounced without notice to appellants; and that, 3d of *July* following,

following, Sir *John Hopsins* made a report *ex parte*, and certified the principal and interest to be 68*l.* and taxed costs 64*l.* 10*s.* 9*d.* all which the Master, without directions or authority, appointed to be paid on 5th *September* then next; and that on 5th *July* the report was confirmed, unless cause in eight days; and that appellants had filed exceptions to the said report, to stay proceedings till they could exhibit their bill of review, which they soon after did; and assigned for errors that they were decreed to pay *Hubbuck's* debt, with interest and costs, not *de bonis intestati* but general, whereby they were subjected to pay out of their own estates; and that costs were awarded against appellants, who being but administrators, were not liable to costs, they having neither broken their trust, nor made any unnecessary adversary defence in the cause; but that a plea and demurrer having nevertheless been allowed to their bill of review, not upon the meer right, but upon the strictness of the forms of proceedings in *Chancery*, they now appealed, and insisted that the decree ought to be reversed; and the rather, for that respondent, *Robert Viguers*, was either dead (*pendente lite*) or absconded, so that he was not to be found or heard of, and that these vexatious proceedings had been carried on in his name by others without any legal authority.

The respondent stated; that his testator exhibited his bill against appellants and *Hester*; and that appellants answered, and the cause was heard as shewed by appellants; and that in regard appellants had not proved any debt due to them from their intestate *Hubbuck*, nor any of the payments mentioned in their schedule, whereby they charged themselves with the receipt of so great a part of the intestate's estate, it was decreed as stated by appellants; which decree respondent insisted ought to be affirmed, because the appellants had made no manner of proofs of any payments by them, or debts due to them or others from their intestate; and therefore no ground for the Chancery to direct an account of assets of the intestate's estate, when appellants had confessed so much cometo their hands, and not proved any payments, nor shewn any colour to retain appellant *Oades's* pretended debt, or any other, and that costs justly followed such a decree even against an administrator.

R. T'bornhill.

Die Lune, 13^o Martii, 1703. After hearing council on this appeal, the same was ADJUDGED to be dismissed, and the decree complained of affirmed. *Lords* *Journ.* vol. xvii. p. 408.

George

*George Mathew, Jun. Esq. and } Appellants.
Martha his Wife,*

*Chichester Phillips, Esq. Thomas }
Browne, and Margaret his Wife, } Respondents.
and Henry Johnson, Esq.*

THE appellants made this case; That in contemplation of a marriage between *Simon Eaton*, junior, and *Mary Aldworth*, appellant *Martha's* father and mother, by articles dated 6th *March*, 1672, *Sir Richard Aldworth*, father of *Mary*, agreed to pay *Sir Simon Eaton*, father of said *Simon*, 2000*l.* on the day the marriage should be consummated, which was to be in *May*, 1678, and 1010*l.* more on several contingencies therein mentioned, and to settle all his real estate, being about 1000*l.* *per ann.* more on the said *Mary* in tail, in default of other issue of his body; and *Sir Simon* agreed to settle a jointure on *Mary* of 400*l.* *per ann.* and the inheritance thereof on her if she survived her husband without issue by him; and also to settle 400*l.* *per ann.* more on his said son for his and his wife's maintenance during *Sir Simon's* life; and afterwards all his real estate on him and his heirs for ever: And further agreed (at his death) to leave and bequeath all his personal estate to his said son and his issue by *Mary*, provided he and his said wife should give no just cause to the contrary, by any gross, obstinate or habitual undutifulness: And that *Sir Simon* accordingly, by lease and release, 4th and 5th *June*, 1678, (the marriage being had on the sixth) conveyed unto *John Travers* and *George Aylmer*, and their heirs, part of his real estate whereof 400*l.* *per ann.* was to the use of *Simon*, junior, for life, remainder to *Mary* for life, and after their death to the heirs male of *Simon*, on the body of *Mary*, with remainder to the heirs of the said *Simon Eaton*, junior; and for default thereof, to *Mary* and her right heirs for ever, if *Simon* should die before her without issue; and as to the remaining 400*l.* *per ann.* to the use of *Simon* junior, and the heirs of his body; remainder to *Sir Simon* and his right heirs for ever: And that *Sir Simon*, by other deeds of the same date, settled all the rest of his then real Estate to the

the use of himself for life; remainder in tail general to *Simon* the younger; remainder in fee to himself; and therein inserted a general power of revocation, whereas, as appellant's insisted he ought not by the articles to have any such power: And appellants stated further, that *Simon* and *Mary* had issue appellant *Martha*, their only child and heir, and that *Simon* died in the year 1684, and *Mary* in 1686 (with the consent of her father Sir *Richard Aldworth*) intermarried with *George Mathew* senior, Esq; father of the appellant *George Mathew*, junior, and that they all lived in great affection for some years after: And that Sir *Simon*, being about eighty years old, weak and infirm, was almost solely governed by dame *Susanna* his wife, who had issue (by a former husband) the respondent *Phillips* and other children; and though his son *Simon*, and *Mary* his wife, were dutiful, and no way disobeyed him, yet *Susanna* and her children contrived to get as much of his estate as they could, and to employ respondent *Phillips* to receive his rents and debts, and prevailed with him to differ with *Mary* touching the guardianship of the appellant *Martha*, whom she bred a protestant; and not long before his death (which happened in 1697) drew him in to execute some deed or deeds, for some nominal consideration, and to make some will, and *Susanna* and *Phillips* executors, by which they pretended that he disposed of all his mortgages, debts, and personal estate to respondent *Phillips* and other the children and grand-children of dame *Susanna*; and settled on the respondent *Phillips* the said remainder in fee of the said 400*l. per ann.* which he limited to himself in the deed of settlement; but which by the said articles ought to have been limited to his son *Simon* and his heirs, and that appellant *Martha* was his heir, and under colour of the said general power of revocation contained in the other deed entirely to revoke the same, and give all the rest of his real estate to respondent *Phillips*; and that all the mortgages, debts, and personal estate amounting to great value, were contrary to the articles, enjoyed by respondents *Phillips*, who possessed all the deeds and evidences relating to Sir *Simon*'s estate: And that appellants, being then infants, by their next friend exhibited their bill in Chancery in Ireland against respondents dame *Susanna*, since deceased, and others, for a specific performance of the articles, whereunto a plea and answer was put in; and respondent

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respondent *Phillips* insisted he knew nothing of the articles or deeds till after Sir *Simon*'s death, but believed there were some such, and referred to them when proved; and believed that *Simon*, junior, and his wife, were dutiful, and left issue appellant *Martha*, and that she and her mother are protestants; and concluded that he was a purchaser for valuable considerations, without notice of the articles: And that the plea being argued, was allowed good (if proved) wherefore appellant replied, that respondent *Phillips* was not a purchaser for valuable considerations, and that he had notice of the articles; and proved the articles and payment of the portion; and that the power of revocation was inserted in the second deed, expressly against the good liking of Sir *Richard Aldworth*, and that Sir *Simon* then declared that he inserted it only to have a hanck on his son, and keep him within his duty, and not any way to avoid his articles, and proved expressly notice of the articles to dame *Susanna*, and also notice to respondent *Phillips* by several witnesses; and that *Simon*, junior, and his wife, were very dutiful, and lived with Sir *Simon*, who was very fond of them; and also of *George Mathew*, senior; and that there was always a good correspondence between appellants and Sir *Simon*; And that on the hearing, 14th November, 1701, appellants offered to read a bond for performance of the covenants in the articles, which was opposed by respondents council, and refused by the court to be read, because not put in issue in the pleadings, or proved; yet that this was made the principal ground of the Lord Chancellors judgment to dismiss the bill: And that when respondents pretended deeds of purchase were read, there appeared no such valuable consideration inserted therein, as he had sworn in his plea and answer, the only consideration being past services, 5*l.* in hand, and 400*l.* per ann. to Sir *Simon* for life; nor was there any mention of any account stated, as sworn in the plea and answer; yet that the Chancellor decreed that the appellants were not intitled to a specific performance of the articles, in regard of the length of time, and declared that the deeds made before marriage (though with a power of revocation in one of them) were an execution of the articles and accepted as such, and that respondent *Phillips* did not prove himself such a purchaser for valuable consideration as would avoid a performance of the articles

1703.

1703. { articles in specie, if appellants were intitled to it; and as to appellants demand of the performance of the articles relating to the personal estate, he was of opinion that in regard of the bond, whereon a recovery might be had at law against the disposition made by the will of Sir *Simon*, or any deed that should appear to be made fraudulently to avoid the articles, that the appellants ought not to have an execution in specie of the articles in a court of equity, and therefore dismissed appellants bill; which decree appellants insisted ought to be reversed: And appellants decreed to have a specific performance of the articles, and an account of the real and personal estate of Sir *Simon*, and a discovery and delivery of all deeds, evidences and writings relating thereunto; and that the pretended deed of purchase ought to be set aside; and insisted no notice was necessary to avoid a voluntary conveyance, or will, and this the rather, because appellant *Martha* was heir at law to Sir *Simon*, and respondent *Phillips*, no way related to him in blood; and because *Mary* the mother, and *Simon* her husband, were infants when married in 1678, and therefore could not agree to those deeds contrary to the articles.

R. Thornhill.

The respondent, *Cbichester Phillips*, on his part shewed, that after his father's death his mother married *Simon*, afterwards Sir *Simon Eaton*, and by him had issue (only) *Simon*, who married as stated by appellants, and died in 1684; and that before that marriage two settlements were made by Sir *Simon Eaton*; one irrevocable, the other revocable; and by the irrevocable settlement, an estate of Sir *Simon*'s then worth 800*l.* and now above 1000*l. per annum*, was for the small portion of 2000*l.* settled as shewed by appellants; and that by the revocable settlement, another real estate of small value was settled on Sir *Simon* for life, remainder in general tail to his son, with a remainder in fee to himself; and that these settlements were made with great deliberation, and Sir *Richard* and all other parties acquiesced for above 20 years under these settlements: And that two years after young *Simon*'s death, *Mary* married *George Mathews*, senior, a protestant papist, father of appellant *George*; at which Sir *Simon* was very uneasy, because he feared Mr. *Mathews*, senior, would marry his son, likewise a papist and bred in *France*, to *Martha*; and that thereby the estate

estate (which Sir *Simon*, a protestant, had acquired by his services in the wars against the rebellious Irish papists) would go into a popish family, and to the son of one who had been remarkably zealous against the protestant interest, and his late Majesty King *William*: And that Sir *Simon* thereupon applied to the Court of Chancery in *England*, to have the guardianship of *Martha*, and that Court ordered Mr. *Mathews*, senior, to give a recognizance of 200*l.* that *Martha* should not be married without leave of that Court; and that Sir *Simon* expressed his dislike of the second marriage of *Mary* by several letters, and also by revoking the revocable settlement, which he did about two years after that marriage, and proposed several protestant matches, of honour, quality, and considerable estates for *Martha*, to prevent her marrying with Mr. *Mathews*'s son, who in respect of estate, as well as religion, was an unfit match for her; all which matches were eluded by the Mr. *Mathews*, senior: And that after the death of young *Simon*, and marriage of *Mary*, Sir *Simon*, upon the rebellion in *Ireland*, escaped to *England*, and being very old, never returned back, but earnestly desired the respondent to quit his employment in *England*, (being Captain Lieutenant of horse) and go into *Ireland* to take care of his estate and affairs there, promising to reward him well for so doing, which appeared by several letters: and that respondent accordingly quitted his employment, and went to *Ireland*, and found Sir *Simon*'s estate in very ill circumstances; and that respondent was forced to take many journeys, and be at the trouble and expence of many law suits to secure what he could for Sir *Simon*: After several years, Sir *Simon* wrote to him to come to an agreement for what estate Sir *Simon* had left, and to allow Sir *Simon* a certain yearly sum for his life: And in *June*, 1695, Sir *Simon* executed a second solemn revocation of the revocable settlement, having in the month of *April*, 1688, perfected a writing of revocation, in order, (as indorsed thereon, by the said *Simon*'s own hand) to have liberty to dispose of all but 800*l.* per annum; and, 1st *April*, 1696, executed a deed, specifying several debts due to him; whereby, in consideration of respondent's said expences of his seven years service, and 400*l.* per annum, to be paid him by respondent during his life he assigned those debts to the respondent for his own use, and conveyed to him that small real estate which he had in his

his power, (under 60*l.* *per annum*) and (though not mentioned in the deed) respondent, as a further consideration, actually gave a bond to pay the Lady *Eaton* 250*l.* *per annum* during her life, in case she survived Sir *Simon*, as she afterwards did for four years; and that Sir *Simon* afterwards made his will, and therein (taking notice of the extreme undutifulness of *Mary*) devised all his estate, real and personal, to the respondent and his heirs, subject to several annuities, whereby the remainder in fee of 400*l.* of the 800*l.* *per annum*; expectant upon the death of *Martha* without issue, was also devised to the respondent: And that Sir *Simon*'s fears were just, for within a fortnight after his death, and about two days before the Irish act against protestants intermarrying with papists took effect, and after the same was passed, Mr. *Mathews* married *Martha* (then not above 15 years old) to his son, who had been educated as aforesaid: and that respondent endeavoured to obtain an act of Parliament to prevent *Martha* (whilst under the power of a popish husband) from joining in a fine and recovery to barr her own issue, or the remainder devised to respondent (which was unanimously agreed to by the House of Commons of *Ireland*;) but opposed here by appellant and his father, and failed; so that the whole 800*l.* now above 1000*l.* *per annum*, or the produce of it in money, was likely to go from a protestant family, among papists, who were but too rich and powerful in *Ireland* already: And that Mr. *Mathews* having found out a part of some imperfect articles, said to be executed between Sir *Simon Eaton* and Sir *Richard Aldworth*, in relation to the marriage between young *Simon* and *Mary*, in 1672, in *Michaelmas* term, 1699, (more than 27 years after the articles, and more than 20 years after the marriage-settlement) exhibited a bill in the name of the appellants in the Chancery of *Ireland*, seeking to impeach and overthrow not only Sir *Simon Eaton*'s will, but his said deed of conveyance and assignment to respondent; and respondent, in affirmance of the decree, shewed that it appeared in the cause, that both the deed and the will were made in *England*, while respondent was in *Ireland*, and that his mother knew nothing of the contents of either; that Sir *Simon* himself dictated the will, (which confirmed the deed) and signed and published the will when of good understanding, in the presence of

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of unexceptionable witnesses, who had proved it beyond all doubt : And respondent insisted, that as to the personal estate, the articles (if in force) could not affect respondent's title under a sale and assignment for valuable consideration during Sir *Simon's* life ; and that the undutifulness of *Mary*, in marrying a popish husband, was such an undutifulness, and in so considerable a point, as might be a sufficient reason for Sir *Simon* to dispose by will as he pleased of his personal estate ; and that respondent was a purchaser for valuable consideration both of the real and personal estate comprized in the deed, without notice of the articles ; this he pleaded to the bill ; and insisted upon it as a sufficient defence, if the articles were such as were intended to have been the rule and unalterable measure of the settlement made six years after : And that the articles were only a declaration of what their intentions were, according as circumstances then stood ; and that this was evident from the title of the articles themselves, *viz.* Articles agreed on the 6th of *March*, 1672, in order to a contract to be speedily had between young *Simon* and *Mary*, in order to a marriage to be solemnized between them in 1678 ; which respondent insisted shewed them to be then thought imperfect ; and that the settlements being deliberately made, upon further consideration, by consent of the parties to the articles, six years after the articles, and yet before the marriage, ought to be construed the completion and perfection of that contract, and the articles to be thereby waved, or specifically executed, especially after so long an acquiescence.

W. Cow-
per.
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ley.

Die Sabbati, 18^o *March*, 1703. After hearing council upon this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the decree of dismissal complained of affirmed : And that appellants should pay respondents 40*l.* further costs in defending this appeal. *Lords Journ.* vol. xvii. p. 487.

A 2

Anne

1706.

Anne Cole, Widow, and *Harry* } Appellants.
Cole, Esq.

Mercy Godfrey, Executrix of *William Godfrey*, Executor of *Henry Godfrey*, } Respondent.

Case 68.

THE appellants made this case: That, in 1690, *Henry Godfrey*, an attorney at law, was a married man, and acted as attorney and solicitor for appellant *Anne*, and at several times lent her several sums of money, and left in her hands several other sums, as cash for his convenience, until he should call for the same, without any memorandum or security, and for discovery and payment of such sums, *William Godfrey*, as said *Henry's* executor, in *Easter* term, 1703, exhibited his bill in *Chancery* against appellant, alleging that she was indebted to his testator in 350*l.* for money lent, and to secure this and other debts had assigned an annuity of 500*l.* and upwards, and all her personal estate to the appellant *Harry*, reserving only an annuity of 50*l.* for herself; and that appellants answered, and appellant *Anne* acknowledged that she borrowed several sums of the said *Henry Godfrey*, and that the said *Henry Godfrey* had left in her hands several other sums, all which she had repaid him in his life time, except 100*l.* brought into the court of *Queen's Bench* upon the common rule, on an action brought against her there by said *William Godfrey* for 1034*l.* 10*s.* 4*d.* before the said bill exhibited. And both appellants averred that appellant *Anne* never made over her annuity or personal estate to appellant *Harry*, upon any account whatever: And the appellant *Harry* averred he never received the profits of the annuity under any trust or assignment whatever: And that 31st *May*, 1704, that cause was heard before the Master of the *Rolls ex parte*, who decreed an account of what said *Henry Godfrey* advanced and lent appellant *Anne* which was not repaid in his life-time, with interest and costs; and on a re-hearing 7th *March*, 1704, affirmed the former order, with this alteration; that costs should be reserved till after the account taken, and the said Master was to report any difficulty arising in the accounts specially; but

but that said *William*, before any farther proceedings, signed and enrolled that decree, which was not usual; and that the master, 7th *December*, 1705, reported 414*l.* due for principal and interest, without distinguishing what was lent, and what deposited with appellant *Anne* and ordered the appellant to pay the same. And that *William Godfrey* died, and respondent *Mercy* his sole executrix, in *May*, 1706, brought a bill to revive these proceedings; and the cause was re-heard, on appeal to the Lord *Keeper*, 29th *January*, 1706; and respondent insisting that the decree was signed and enrolled, his Lordship would not proceed to re-hear the cause, and the order for re-hearing was discharged, though costs were given respondent by an order made the 21st day of *December* subsequent to the enrollment; which order and decree appellants insisted ought to be reversed, because the money pretended by respondent to be lent, was only deposited, and not lent; and though lent, it was not lent upon any security to carry interest, nor was any day of payment set for the same, but decernable at pleasure; therefore no interest ought to have been decreed to the respondent's testator for the same; and appellant *Harry* was decreed to pay the money due by appellant *Anne*, with interest and costs, jointly with her, though it was not pretended that he was concerned in any of the transactions between *Henry Godfrey* and appellant *Anne*, or any way security for the same; and because the cause abated by the death of *William Godfrey*, and was not regularly revived; for that the same ought to have been revived by *Scire facias*, and not by bill: And finally because the 100*l.* paid into Court before the said suit commenced, was the whole principal debt due to testator *Henry*, or respondent's testator; and had not the decree ordered interest, appellants might have been intitled to costs, having before made proof thereof in the said action by one Mrs. *Rodes*, which witness was Law. dead before the bringing the bill, and was the occasion Carter. of this suit.

The respondents on the other hand stated, that *Henry Godfrey* had lent appellant *Anne*, in 1691, 92, 93, and 94, 1200*l.* and upwards, and, with much solicitations, received part of the money, and that in 1699, *Henry Godfrey* drew up a just account between him and appellant *Anne*, stating a balance of 350*l.* due to him for principal

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1706.

cipal and interest; and sent it to her, and she made no objections thereto, but afterwards wrote him a letter that she had received such account, and had not then monies in her hands to pay the same, but had written to her son, the other appellant, who had twice as much of her monies in his hands, and desired testator to send to him for his money; and that testator accordingly sent to appellant *Harry*, who wrote by his own servant, that if 40 or 50*l.* would do him any kindness, he would send him the same: And that thereupon testator insisted to have the whole 35*0l.* paid in together: And that *Henry Godfrey* died in 1700, before he had received any part, and made *William*; his brother, sole executor, and that appellants had often promised, by letters and otherwise, under their hands, to pay that money; but appellants failing in their promises, said *William* exhibited his bill, as stated by appellant, and the appellants had in their answer denied the assignment from appellant *Anne* to the other appellant, yet that *Henry Godfrey* had, as her attorney, drawn such assignment, and that respondent had the original draught in his hands; and that the hearing, decree, rehearing, and further hearing and final decree, as stated by appellants, were had, which decree respondent insisted was just, and ought to be affirmed with exemplary costs.

Wm. Basset.
nastre.

Die Mercurii, 12^o Martii, 1706. After hearing council upon this appeal, it was ADJUDGED by the Lords that the same should be dismissed; and the decree, orders, and proceedings complained of affirmed, and that appellants pay respondent 1*0l.* for her costs in this appeal. *Lords Journ.* vol. xviii. 282.

John

John Deye, Executor of *Elizabeth* } Appellant.
Albby, Widow, deceased, - }

Thomas Stevenson, and *Jane* his Wife, Respondents.

Case 69.

THE appellant stated: That *Champion Albby* the husband of the testatrix *Elizabeth*, died intestate, and she administered, and died 20th *February*, 1699, and left part of her husband's estate unadministered, and appellant, her executor, in possession thereof and of her own estate: And 100*l.* being given respondent *Jane* by testatrix, respondents, in *Easter* term, 1702, filed a bill against appellant, and, by intrigue with appellant's clerk in court, and the late Lord Keeper *Wright* refusing to give appellant a week's time to examine his witnesses, by surprise, 22d *May*, 1704, obtained a decree *ex parte* for this legacy, though respondents and their assistants had gotten the executory estate, whereout this legacy should have been paid, and 69*l.* 18*s.* 5*d.* for costs; which were extravagant costs, as respondents had examined but three witnesses; and that respondents had by answer to a cross bill, in effect confessed these facts; and that by that decree it was referred to a master to take an account of the personal estate of the testatrix come to appellant's hands, and to compute what was due for the legacy, and interest, from the end of three months after the date of the will, and that appellant pay what the master report with costs, so far as assets came to his hands; and appellant complained that the decree took no notice that appellant had been so possessed of the estate by the legatee herself, though appellant had insisted thereon by his answer, and that respondents had on this decree, on pretence that appellant had absconded, clandestinely gotten a sequestration, and, 25th *March*, 1706, sequestered appellant's own lands of inheritance, and his household goods, 5*l.* to the value of 3000*l.* for this 100*l.* legacy, without serving the decree, or letting him know what it was, though they might have served it when they personally served him with a subpoena, 2d *April*, 1705, at his dwelling house in *Thursford* in *Norfolk*, and that appellant was not yet in contempt under the decree, and therefore the sequestration

1706. { sequestration was unwarrantably obtained; and the respondent *Jane*, because the money was decreed to be paid 3d April, 1705, the very next day after the subpoena served; which decree and proceedings therefore appellant insisted ought to be reversed, because appellant had not (as by law, and the course of equity, he insisted he ought to have had) liberty to examine his witnesses, and make his defence upon the usual affidavits; and that appellant's defence would have been sufficient; and because respondent *Jane* had divested appellant of the possession of the estate, out of which the legacy should have been paid, and thereby made herself an executor, and her own carver, and got more than her legacy amounted to: And further, because by the decree appellant, an executor, was to pay interest for this legacy, from three months after the date of the will, though there was no proof to ground it: And finally, because it did not appear by the proofs taken, nor by respondents answer, neither was it true that appellant had any of the said estates after the 7th of *March*, 1699.

Isaac
Hawkins.
Fran.
Hollins-
head.

The respondents on the other hand shewed, that respondent *Jane* was one of the daughters of *Elizabeth Asby*, deceased, for whom appellant had done some business as her attorney, and, lodging in her house, had frequent opportunity of conversing with her, and insinuated himself into her good esteem, and prevailed on her to make her will, dated 28th *January*, 1699, and himself executor, in trust for her five younger children, *William, Fletcher, Champion, John* and *Susan*, who were all infants: And that testatrix by this will gave respondent *Jane*, then a widow, by the name of *Jane Patrick*, a legacy of 100*l.* in money, and some household goods, and, after other particular legacies, gave the residue of her estate to her five younger children equally, and made appellant executor in trust for them, and gave him only a legacy of 10*l.* but that appellant inserted a clause in the will, that in case any of the children gave him any disturbance in the executorship, or called him to an account for what he did in relation thereto, such children should forfeit their legacies: And that testatrix had been long sick of a languishing distemper, and appellant being daily with her, prevailed upon her to turn all her estate, amounting to near 5000*l.* into goldsmiths bills, bank bills, and ready money, that he might the better carry it off as soon as she was dead: And that she

she died 20th *February*, 1699, and appellant next morning sent for a goldsmith and opened her scrutore, and took from thence near 5000*l.* in bank bills, goldsmiths bills, and money, and there being 800 Guineas in specie, he took out 100 of them upon pretence to defray the funeral charges, but the rest of them he paid to the goldsmith, in the presence of the children, for whom he was trustee, and then appellant would have turned the house and household goods into money; but those being the estate of *Champion Asbby*, the husband of *Elizabeth*, *Thomas Asbby*, the eldest son, took out administration *de bonis non*, and possessed himself thereof, and took an inventory of all the goods, as well those in appellant's chamber as in the other rooms; and when appellant found himself thus disappointed, he went away with all the ready money, goldsmiths bills, &c. and left the children, for whom he was trustee, to the care of their friends; and that respondents finding appellant had so abandoned the children, and was spending the estate in an extravagant manner, brought their bill in Chancery for their legacy; and appellant, in his answer, made this defence: That after he had possessed himself of Mrs. *Asbby's* estate under her will, *Thomas*, the eldest son, under his administration *de bonis non*, to his father, entered upon him and turned him out of the house, and divested him of all Mrs. *Asbby's* estate, which he had so possessed himself of by virtue of her will; but never attempted to prove that fictitious defence; but when the cause came to be heard, moved to put it off, and for time to examine, pretending his own clerk in Chancery had betrayed him; and that the cause was regularly brought to hearing, and the Lord Keeper *Wright*, in the presence of council on both sides (and not *ex parte*) decreed, as stated by appellant, and that appellant had been several times summoned to attend the master, but did not; and that the master, 31st *July*, 1704, reported 128*l.* 10*s.* due for the legacy and interest; and taxed respondents costs at 69*l.* 18*s.* 5*d.* and that by this time appellant had wasted, all the assets, and absconded, so that respondents could not find him to serve him with the writ of execution of the decree; and upon the usual affidavit obtained an order that service of his clerk in Chancery, and agent at law, should be good service; and that this order and writ of execution had been served accordingly, and the money not being paid, respondents prosecuted

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prosecuted appellant for his contempt to an attachment, proclamation, commission of rebellion, and serjeant at arms; and upon the serjeant's return, that he could not find the appellant, respondent had a sequestration against his estate, and after the sequestration executed, appellant set up one *Anne Cotton*, his own sister, to make title to all his lands and goods sequestered, and would cover part of the lands under an old deed, pretended to be made by his father, of near 50 years standing, for raising 150*l.* for her portion, and the rest of the lands and goods under a bargain and sale, pretended to be made to her by himself; after he was so in contempt and that appellant had put respondents to 150*l.* charges, for recovery of 100*l.* legacy; and respondents insisted that the decree ought to be affirmed, and the appeal dismissed with exemplary costs; because it was not controverted, that respondents were entitled to the legacy, and it was fully proved that between 4000 and 5000*l.* of Mrs. *Alby's* estate had come to appellant's hands, for which he had not in any manner accounted; and because appellant had less reason to pretend surprise in respondents proceedings in Chancery, in regard he himself is an attorney, and solicitor there.

W. Peere
Williams.

Die Jovis, 20^o Februarii, 1706. After hearing council on this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the decree complained of affirmed; and that appellant should pay respondents 50*l.* costs of defending the appeal, to be levied by the sequestration appellant's estate then lay under. *Lords Journ.* vol. xviii. 246.

Thomas

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1706.
}

Thomas Lewes, Gent. - - Appellant.

Israel Fielding, Esq; John Fairer, } Respondents.
and Thomas Wilkinson, - -

THE appellant shewed: That *Henry Hampson*, Esq. Case 70.
being seized and posselt of several estates in *Devon*
and *Cornwall*, and in *Taplow* in *Bucks*, by indenture, 15th *November*, 1699, mortgaged the same to appellant for 2500*l.* principal money; and afterwards, by indenture, 4th *December*, 1700, for the further sum of 503*l.* 15*s.* making together 3003*l.* 15*s.* and for the further consideration of an annuity of 120*l.* tax-free, payable to the said *Henry Hampson* for his life, charged on appellant's estate in the county of *Southampton*, conveyed the equity of redemption, and all the mortgaged estates in fee; and that appellant had ever since been in possession, and laid out considerable sums in improvements: and that since the purchase, respondents pretending great judgment debts due to them from the said *Henry Hampson*, about *July*, 1701, exhibited their bill in Chancery against appellant, praying a redemption of the premises on payment of what should appear due to him on the mortgage, but took no notice of the absolute purchase: And that appellant had put in a plea and answer to that bill, and insisted on his purchase for a full and valuable consideration; and that at the time of his purchase he had no notice of respondents judgments; but that appellant had no opportunity upon that plea, to call in question the reality of the alleged debts; and that an issue was afterwards directed to try whether appellant had notice of the judgments, and it was found that the appellant had notice of the said judgments before the 4th of *December*, 1700; and the cause coming to be heard, upon the equity reserved. 27th *April*, 1703, before the Master of the Rolls, he decreed that appellant should pay respondents within six months, what Sir *Lacon William Cbild*, the master, should find due to them, and that respondents should thereupon assign their judgments to appellant; but in default thereof, respondents to pay appellant what the master should report due on the 2500*l.* mortgage; and appellant thereupon to convey to them all his interest

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in the premises; but the Master was not to ravel into any accounts already stated between *Henry Hampson*, and respondents, which decree appellatant insisted was erroneous, and incorrect, because no direction was given the master to enquire into the reality of respondents debts, though denied by the answer of *Henry Hampson*; whereas, in all events, appellatant being a purchaser for full value, *bona fide* paid, ought to pay no more upon these judgments, than upon a fair inquiry and proof should appear justly due thereon: And further, because the decree bound appellatant by accounts stated between respondent and *Hampson*, without notice to appellatant; and because appellatant had petitioned the Lord Keeper for a re-hearing on these grounds, but respondents procured the decree to be signed within a few hours after the order had passed the register, and afterwards to be inrolled, notwithstanding appellatant had the very same day the order passed the register, and before any actual inrollment of the said decree, entered a caveat against signing and inrolling it: And the Lord Keeper had declared he could not grant a re-hearing, by reason of the inrollment; nor could he open or set aside the inrollment.

Mi. New-
nam.
Jof. Ay-
loffe.

The respondents on their part stated, that *Henry Hampson* had contracted many debts, and his goods were taken in execution at the suit of *William Cherry*, Esq. and he about the latter end of the year 1696, defired respondent *Fielding's* assistance, which he promised, and thereupon paid the execution money, and redeemed his goods, and between that time and the 5th of *June*, 1697, paid several of *Hampson's* creditors, and lent *Hampson* divers sums, and for his security took two several bonds of 500*l.* each, and that, 5th *June*, 1697, *Fielding* and *Hampson* came to an account, when there was due to *Fielding* 1332*l.* 5*s.* 6*d.* and *Hampson* owing other debts, intreated *Fielding* to undertake the payment thereof, which he did, and thereupon *Hampson* gave *Fielding* a bond of 3000*l.* conditioned to pay 1500*l.* and confessed a judgment in 3000*l.* and the two former bonds were then delivered up and cancelled; and that *Fielding*, between 5th and 30th *June*; 1697, paid for and lent *Hampson* several sums; and on the said 30th of *June*, *Fielding* and *Hampson* came to a second stated account; and that there then remained due to *Fielding* 1500*l.* and that at the passing each account all,

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all vouchers were delivered up, as appeared under *Hampson's* hand and seal: And that *Hampson* being likewise indebted to respondent *Wilkinson* 62*l.* for goods sold and money lent, and secured by two bonds, *Wilkinson* put the bonds in suit, and recovered judgment in *Michaelmas* term, 1697: And that *Hampson* was likewise indebted to respondent *Fairer* in 55*l.* and 67*l.* 10*s.* for goods sold and money lent, both which sums *Hampson* secured by two judgments in *Trinity* and *Michaelmas* terms, 1697; and that respondents discovering that *Hampson* had made several mortgages of his estate in *Devon, Cornwall, and Taplowe* in *Bucks, to Green, Smith, and Loddington*, and that they had assigned their securities to appellant, acquainted appellant with the nature of their respective debts, and how secured, in hopes appellant would have accepted from them the money he had paid *Green, Smith, and Loddington*, with interest, and assign his securities; but appellant, long after he had such notice, viz. 4th *December*, 1700, procured to himself a release of the equity of redemption of the said premises from the said *Hampson*, and that therefore respondents exhibited their bill in Chancery against appellant and others for discovery of what he paid *Green, Smith, and Loddington*, upon those securities, and whether he had not notice of their judgments, and that respondent, might be admitted to redeem, or appellant be decreed to pay them their judgment debts: And that appellant pleaded as shewed by him; and by answer positively denied, that at the time of executing the said release of the 4th *December*, 1700, or at any time before he had notice of the respondents judgments, and that the cause was heard, 9th *December*, 1702, and an issue directed as to the question of notice, which was tried before Lord Chief Justice *Trevor*, in *Hilary Term*, 1702; and upon full evidence, a verdict found for respondents; and that on hearing the cause on the equity reserved, such decree as shewed by appellant was made; and that appellant complained that the decree was irregularly inrolled, but the late Lord Keeper, after a strict examination of the registers and clerks in court as to the practice, was of opinion that the decree had been regularly signed and inrolled: and that respondents then proceeded before the master upon the account, and the master on hearing both sides, made a first and second report, to which appellant took exceptions, which were argued and re-argued, and sent back

1706.

to the master, who made a third report; and stated respondents several debts, interests, and costs, in the whole to amount to 240*3*l. 3*s*. 2*d*. which he appointed appellant to pay: And that this report was made absolute; and that pending this account, appellant exhibited a cross-bill; to which respondents pleaded the former decree inrolled for the same matter, and that plea was allowed, and the bill dismissed; and that appellant utterly refusing to pay the sums reported, respondents were obliged to begin again upon the other part of the decree, and accordingly proceeded before the master to see what was due to appellant, and exhibited interrogatories to examine appellant as to the profits received; to which he put in several insufficient examinations, and was taken into custody of a messenger, and continued in custody several months before he perfected his examinations: And after many other delays, the master reported what was due to the appellant for principal, interest, and costs; and to this report also appellant took divers exceptions, and among others, that the master had not allowed him two several sums paid *Hampson*, which were never mentioned in all the proceedings before, viz. 150*l*. paid 6th *February*, 1699, and 250*l*. paid 29th *October*, 1700; and that these exceptions were argued before the Lord Keeper; and it plainly appearing by several witnesses, that the appellant had notice of *Fielding's* judgment before the pretended payment of 250*l*. that sum was disallowed, but as to the 150*l*. his Lordship directed an issue at law, to try whether appellant had notice of *Fielding's* judgment before 6th *February*, 1699; and ordered *Fielding*, in the mean time, to pay this 150*l*. and interest, together with the other sums, then settled, upon arguing the exceptions amounting to 380*5*l. 1*s*. 7*d*. to appellant, and appellant thereupon to bring all the deeds and writings before the master, and to re-convey the premises to respondents: And that *Fielding*, at the time appointed, made a tender of the 380*5*l. 1*s*. 7*d*. which was refused, and afterwards brought on a trial as to the 150*l*. before Lord Chief Justice *Trevor*, and a verdict was found against appellant: And that respondent then prosecuted appellant to bring the deeds before the master, in order to prepare a conveyance; and an order being granted for the messenger to take appellant into custody for contempt,

contempt, appellant had brought the present appeal, which respondent insisted ought to be dismissed, and the decree affirmed, because the appellant's oath, in his plea, that he was a purchaser of the equity of redemption on the 4th *December*, 1700, without notice, had been falsified by two verdicts at law.

Die Martis, 21^o *Januarii*, 1706. After hearing council upon this appeal, it was ADJUDGED by the Lords that the same should be dismissed; and the decree complained of affirmed. *Lords Journ.* vol. xviii. p. 199.

Hyacinth

1706.

Hyacinth Pilley, Gent. - - Appellant.

Hugh Madden, and Katherine his } Respondents.
Wife, - - -

Case 71.

THE appellant made this case: That *Peter Pilley*, his father, a papist, was, in 1653, dispossessed of his paternal estate, and, in 1656, was by the then commissioners for adjudication of claims and qualifications of the Irish, adjudged to be comprised within the eighth qualification of the act made by the then powers for settling of *Ireland*, and decreed to lands in *Connaught* or *Clare*, amounting in quantity or number of acres to two thirds of his ancient estate; but had no benefit thereof till 1676; and, that in 1653, a treaty was set on foot between said *Peter Pilley* and *John Oshaldesdon*, grandfather of respondent *Katherine*, for a marriage between *Peter* and *Mary*; only daughter and heir of *John*, and articles dated 18th September, 1673, were entered into, whereby *Oshaldesdon* agreed to settle the lands of *Tully, Carroward, Carrowkeele, Coggalmore, Coggalbeg, Lisfenerin* and *Derrington*, (which were concealed forfeited lands) and *Annagharry, Bunewogane* and *Carrowtornanc* (which were the estate and inheritance of other persons) in the County of *Roscommon* in *Ireland*, on the said *Peter* and *Mary*, and the heirs of their bodies, after the death of *Martha Nelson, Oshaldesdon's* sister-in-law, who, he said, had a jointure in them for her life: And 800*l.* was to be secured out of the lands to the issue female, in failure of issue male; and the remainder to be limited to *Oshaldesdon* and his heirs; and this estate so to be settled, was the only marriage-fortune of *Mary*, and thereby *Peter Pilley*, on his part, covenanted, when restored to his ancient estate, thereout to assure lands of the yearly value of 50*l.* to the use of *Mary*, for life, for a jointure, and in lieu of her dower, when so restored, and to entail that estate to the issue male of that marriage; with a like agreement to secure 800*l.* out of such estate to the issue female, in failure of issue male; and the remainder in fee to be limited to his own right heirs; and that *Peter Pilley*, in confidence of these articles, married *Mary*, and perfected a bond of 400*l.* penalty, bearing

date

date the 22d of September, 1673, with a condition to lay out 200*l.* as a further provision, for the issue of that marriage; and that after the marriage, in the life-time of *Martha Nelson* and *John Osbaldeston*, the late King *Charles* the second, appointed commissioners for hearing and confirming the title of transplanted persons, and to re-prize deficient transplanters, and confirm those that had right, and to dispose of the estates of those that had no right, according to the acts of settlement and explanation, which commissioners were to make a common stock for reprizals out of all forfeited and undisposed lands in *Connaught* and *Clare*; and that *Peter Pilley*, in 1676, exhibited his claim before the commissioners, as a deficient transplanted person, who had had a decree before the commissioners at *Athlone*, in 1656, but to whom no lands had been set out for his final settlement; and on this claim the commissioners gave judgment for him to be reprized out of the common stock of reprizals, and that *Peter Pilley*, viewing the common stock of reprizals, found all the lands which *Osbaldeston* had so agreed to settle, except *Annagharry*, comprised in that stock; and that this was the first notice he had of any defect in *Osbaldeston*'s title: and that on a full hearing before the commissioners, it plainly appeared, that these lands had been the estate of *Charles O'Connor Roe*, and of other forfeiting persons, on the 23d of October, 1641, and long before, and that *Charles O'Connor Roe* had made a lease for 31 years of *Tully, Carroward, Coggalmore, Coggalbeg*, and *Liffenerin*, to *Edward Deane*, in 1629, and levied a fine *Sur Concessit* thereof to him for said term; and by *Strafford*'s survey, and the grand office found in the late Earl of *Strafford*'s government (which were allowed to be indisputable evidence of the propriety of lands in *Connaught*) those lands were proved to be the propriety of forfeiting persons; and that *Geffery Osbaldeston* had no title but in right of his wife, the widow of said *Edward Deane*, and devisee of the remainder of the term of 31 years, under the will of *Edward Deane*, and that after her death *Geffery* married *Martha*, and was by virtue of that lease possessed in 1641: And that *Geffery* died in 1644, and *Martha* married Col. *Nelson*, an officer in the *English* army, and he enjoyed till 1660, claiming merely under that lease, against a transplanted person to whom the lands had been set out by the commissioners in 1656; and that the commissioners, after the strongest opposition and de-

1706. fence, adjudged those lands into the common stock of reprints, as forfeited and undisposed lands, and vested in his majesty by the acts of settlement and explanation, for reprints deficient transplanted persons; and that the commissioners, by certificate under their hands and seals, in 1676, adjudged said lands into the common stock of reprints, and granted them to said *Peter Pilley* and his heirs, in reprints for the two thirds in quantity, and number of acres, to which he was entitled in *Connaught* and *Clare*, and in satisfaction of his deficiency, with a saving for *Martha's* right during her life; and thereupon *Peter Pilley* passed patent on the certificate as a reprints for his own estate pursuant thereto, according to the act of explanation: And that this patent was by the act expressly made good against all titles not therein saved: And that *Mary*, the wife of *Peter*, died, leaving issue the respondent *Katherine* (and *Mary*, who died young) and *Peter* afterwards married *Ursula Lally*, and had issue by her appellant, his only son, and died in 1691, after which *Katherine* married the respondent *Hugh*, and had 100*l.* from *Ursula* for her portion: And that *Martha Nelson* married Sir *Mathew Deane*, and died in 1702, and then appellant entered as son and heir to *Peter Pilley*; and thereupon respondents preferred their bill against him in the Court of Exchequer in *Ireland*, to have the said lands decreed to the respondent *Katherine*, upon the foundation of the said articles, pretending that the said *Peter Pilley*, passed the patent in trust for her. And that appellant answered and set forth his title as above, and denied any trust for respondent *Katherine*; and shewed that *John Osbaldeston* had deluded *Peter Pilley* into the said articles to marry his daughter, and insisted that by the said act of parliament the lands were given to *Peter Pilley* and his heirs, to the use of him and his heirs; and that all estates not saved by the said certificate and patent were barred; and that the said lands having been adjudged, seized and sequestered by the commissioners, no evidence could now be taken contrary to the said acts; and that the cause was heard 15th July, 1704, and the Court directed an issue, to try whether *Peter Pilley* did at any time, and when, declare that the patent should be in trust for his daughter, by *Osbaldeston*, or to strengthen her title; but that respondent not prevailing to obtain a verdict on that issue, petitioned for a re-hearing, and the cause was accordingly re-heard, and mentioned to be before the Chancellor

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Chancellor of the Exchequer, Lord Chief Baron, Mr. Baron *Ecclin*, and Mr. Baron *Johnsen*, (though the Chancellor was not present, but in *England* all that term) and after the cause was re-heard and the proofs read, the Court adjourned the consideration to the following term, and then upon debating the matter the Court was divided, the Lord Chief Baron, and Mr. Baron *Johnsen*, were of opinion for the appellant, that there was no trust; but the Chancellor of the Exchequer, who was not present at the re-hearing, and Mr. Baron *Ecclin*, were of opinion, that there was an implied trust; and the Court being thus divided, the Lord Chief Baron died, and respondents thereupon moved for the judgment of the Court; and though Mr. Baron *Johnsen* (taking notice that the Court upon the re-hearing were divided in opinion) desired no decree might be pronounced till the Court were full; yet the Chancellor, and Baron *Ecclin*, proceeded to make a decree, that appellant should convey to respondent *Katherine* and her heirs, and appellant to be allowed for the deficiencies placed by his father on the said lands, and the charge of passing certificate and patent, over and above the 200*l.* he was to lay out by his bond, and to account for the profits since the death of Lady *Deane*; which decree appellant insisted ought to be reversed, because *John Osbalderson*, at the time of entering into the articles, had not any estate or possession in the premises, and had no portion to give his daughter, but deduced appellant's father with a pretended title, which was a fraud in him; and that the articles founded in fraud, could not be obligatory on *Peter Pilley*, either to purchase the real title, or compel him to pay the 200*l.* for the benefit of the issue of that marriage, for that it was only a covenant for a covenant not performed, and no trust by implication of law can arise upon fraud: And further, because the said acts of parliament had made the judgment of the commissioners final, and that their judgment being grounded on records to reprove appellant's father for lands to which he was intitled in his own right, there was no colour why the letters patents granted to him on just causes, and on good and valuable considerations, arising only on his part, should be construed in trust for those who had no title at all, and who could never have had a pretence to have any assurance made pursuant to the articles: And further, because it was agreed on all hands that *Peter Pilley* never had any

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1706.

any possession of the lands in question under the title of the articles, nor were these articles any motive to his obtaining the letters patents: And though some witnesses of doubtful reputation, had deposed something relating to a declaration, that the letters patents were obtained in trust, and upon account of the marriage articles, which occasioned the sending that point to a trial at law, yet respondents were not able to make out any such trust, and that it must be taken that they waved the pretence of an express trust; yet the Court had thought fit to give judgment upon a supposed trust arising by implication of law: And further, because *Peter Pilley* parted with his own deficiencies and transplantable right, and if he had not so done, would have been intitled to other satisfaction for them, the benefit whereof would have come to appellant by descent, which was irrecoverably lost to appellant; yet the decree, as given, had no regard to those, nor gave appellant any consideration with respect thereto: And finally, because in the said decree no consideration was had of the sum of 100*l.* paid to respondent *Katherine* by appellant's mother for her portion.

J. Jekyll.
 St. John
 Brodrick.

The respondent on the other hand shewed, that *Jeffrey Osbaldeston* was seized and possessed of the lands of *Tully Carroward*, *Liffenerin*, *Coggallmore*, *Coggallhogg*, *Carakeels*, and *Derrinegonne*, long before and after the 23d day of October, 1641; and in consideration of a marriage to be had between him and *Martha Boyle*, daughter to the then archbishop of *Tuam*, and of a considerable portion, settled those lands, among others, to the use of himself for life, remainder to *Martha* for life for her jointure, remainder to the heirs of their two bodies, remainder to his own right heirs, and died in *England*, in 1644, without issue; and the lands remained to *Martha* for life, and the reversion in fee descended to *John Osbaldeston*, brother and heir of *Jeffrey*; and *Martha* some time after married Colonel *Nelson*, of the usurper's army, who in her right enjoyed the said lands till his death; after which *Martha* married Sir *Matthew Deane*, who also in her right enjoyed the said lands until she died, in November, 1702, and that *Jeffrey Osbaldeston*, Colonel *Nelson*, and *Martha*, having been protestants, and not concerned in the rebellion of 1641, these lands were never seized or sequestered by the usurped powers; and that after the restoration, in 1663, commissioners

missioners being appointed, pursuant to the *Irisb* act of settlement, to hear the claims of innocents, said *John Osbaldeston* claimed, as an innocent, several lands he was intitled to, which had been seized and sequestered, and was decreed innocent; but did not claim this remainder, the same not having been seized or sequestered; because if he should, it would make them liable to quit-rent; and that upon hearing the claim before the commissioners, the marriage-settlement of *Jeffry* was proved, and *Jeffry* decreed an innocent protestant, and *John* an innocent papist; and that *John* had an only daughter, *Mary*, and entered into the articles of 1673, for her marriage with *Peter Pilley*, and covenanted to settle the said remainder on *Peter* and *Mary*, and the heirs-male of their bodies, remainder to the heirs female, until such heirs female should be paid 800*l.* and after such payment, to the right heirs of *John*; and that the said *Peter* perfected a bond of 1000*l.* to *John* for performing the articles: And that *Peter* also, together with two other responsible persons, did before the marriage perfect a penal bond of 400*l.* conditioned to lay out 200*l.* in a purchase or mortgage to the use of the issue of the marriage, and that soon after the marriage *John* died without any other issue, whereby the remainder came to *Mary* as his sole daughter and heir; and that *Peter*, in her right, possessed himself of *John*'s personal property, to a considerable value; and that *Mary* soon after died, leaving issue by *Peter* two daughters, respondent *Katherine* and *Mary*, who died young, so that the remainder of said lands came entirely to respondent *Katherine*, as grand-daughter and right heir of *John*; and that, in 1676, whilst *Katherine* and *Mary* were minors, and under the sole care of *Peter Pilley*, their father, commissioners were appointed pursuant to the said act of settlement, for hearing and determining the claims of persons transplanted into *Connaught* and *Clare*; and that *Peter Pilley* being desirous to strengthen the title to said lands by the sanction of certificates and letters-patents under said act, and having some deficiencies of transplanted interests, did, the better to secure the said title, desire liberty from commissioners to place the same on the said lands, as upon lands by himself brought into the stock; which was readily granted to him, and many others who desired the like, because such proceedings eased the stock of reprisals, which was so short, that that such deficiencies were of little value: But *Martha*, then widow of Colonel *Nelson*, being in actual possession

sion of the lands as her jointure, threatened to oppose *Peter Pilley's* so passing the lands; and *Peter* thereupon assured her, that what he did was only intended to strengthen his daughter's title, and that he would give *Martha* a saving in the patent for her jointure: Upon which she gave him no opposition, but lent him several deeds and writings relating to the title of the lands; and the said *Peter* ordered *Hugh Kelly*, his attorney, to proceed in passing the certificate and patent; which *Kelly* refused, and declared he would oppose him, unless *Peter* should give him a declaration under hand and seal, that the patent should be in trust for his daughters *Katherine* and *Mary*, who, by their mother, were *Kelly's* near relations; and accordingly the said *Peter Pilley*, gave *Kelly* a declaration of trust in writing to that effect, as appeared by proof in the cause; but *Kelly* being killed in the late rebellion in *Ireland*, the writing was lost; and *Peter Pilley* several times, before and after passing the patent, declared it to be in trust for his said daughters, in the presence of several persons examined in the cause; and that in some short time after passing the patent, the farmers of quit-rent in *Ireland*, disclaimed the lands in possession of *Martha*; who thereupon complained to *Peter Pilley*, that he had brought that charge and trouble upon her, and requiring him to save her jointure from quit-rent: Whereupon the said *Peter* preferred a petition to the commissioners of the revenue in *Ireland*, setting forth that the said lands were not liable to quit-rent, as never having been forfeited, nor seized or sequestered, for that the same were protestant interest, being the estate of *Jeffry Osbaldeston*, before and after the 23d of *October*, 1641, and after his death the jointure of *Martha*, his wife, who was also a protestant, as appeared by the copy of the petition, all in *Peter Pilley's* hand-writing, and proved and read on the first hearing of the cause; and that *Peter* soon after married *Ursula Lally*, without any other portion than a third part of 200*l.* by whom he had issue the appellant, and died in 1690, or 1691, possessed of a personal estate, worth 1200*l.* and seized of a real estate worth 100*l. per annum*, all which came to appellant; and that in 1693, respondent *Hugh*, by consent of *Ursula*, married *Katherine*, and immediately upon *Martha's* death, in 1702, got peaceable possession of the lands, in right of respondent *Katherine*; but appellant tampering with the

the tenants, prevailed with some not to pay their rents, so that respondents were forced to commence a suit in the *Exchequer* in *Ireland*, against appellant, to quiet respondents in their possession, and to compel appellant to execute the trust, in regard the said *Peter Pilley*, at the time of passing the patent, was father and guardian to the said minors, and had got from the said *Martha* the deeds relating to the title of the lands, upon trust to secure the title for them, and had no pretence thereunto, but by the articles of inter-marrage under the title of *John Osbaldeston*; and that the 200*l.* he was so bound to lay out in a purchase or mortgage for the benefit of his daughters, was much more than the charge of passing the certificate and patent; and that upon the hearing, the late Lord Chief Baron *Donnellane* was of opinion, for the clearer decision of the matter, that it ought to be tried by a jury, whether the said *Peter Pilley* did make any express declaration of a trust; and an issue was accordingly directed to be tried by a jury of the county of *Galway* at the *Exchequer* bar; and that at the first hearing, as well as at the said trial at bar, the said petition of *Peter Pilley* (setting forth that the lands were the estate of *Jeffry Osbaldeston*, a protestant, never seized or sequestered) was read, and given in evidence; but that by the obstinacy of one man, the jury did not give any verdict, wherefore the Court ordered a juror to be withdrawn: After which respondents petitioned for a re-hearing, which was granted; and the cause being solemnly argued by several council of each side in *Easter* term, 1705, and respondents council insisting upon the resulting trust arising from the nature and circumstances of the case, as well as on the positive proofs of an express trust, the cause was kept under advisement of the Court from that time till *Hilary* term following, at which time there was a decree pronounced for the respondents; and that appellant then petitioned for a re-hearing to be had on the 2*d* day of *Michaelmas* term last; and the respondents, by their council, pressed on the said re-hearing, and expected that the appellant would have proceeded therein; and the rather, because Lord Chief Baron *Freeman*, who never heard the cause, then sat on the bench; but the appellant withdrew his petition for a re-hearing, and brought this appeal to the lords in *England*, in hopes to tire out the respondents with expence and charges,

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1706.

George
Lyons.
Richard
More.

charges, which already exceeded the value of the lands; wherefore respondents insisted the appeal ought to be dismissed, and the decree affirmed.

Die Mercurii, 5^o Martii, 1706. After hearing council upon this appeal, it was ADJUDGED by the Lords, that the appeal be dismissed, and the decree complained of affirmed; with this alteration only, that appellant be allowed for the deficiencies, and the charge of passing certificate and patent: what it should appear he laid out above 100*l.* part of the 200*l.* he was to lay out by his bond; the other 100*l.* being paid at respondent *Katherine's* marriage, by appellant's mother, as her portion, and agreed to be allowed as aforesaid. *Lords*

Journ. vol. xviii. p. 269.

Mary

Mary Perry, Widow, and John Perry, surviving Executors of Captain Benjamin Perry, deceased, and others, } Appellants.

Hugh Mervin, and Edward Reilly, } Respondents.

THE appellants made this case: That *Benjamin Perry* had served as an officer in the English army in Ireland, and in 1649, after the rebellion, had the

lands of *Naule, Fieningtown, Borringtown, Mersfides, Kendroesfown, Dardistown, Cloughan, and Cloughertown*, in the County of *Meath*, containing 839 acres, allotted to him in satisfaction of 1695*l.* 1*s.* 3*d.* due to him for his service in that Kingdom, and continued in possession of all these premises till *April*, 1665, when he agreed to sell to Sir *Audley Mervin*, then Prime Sergeant at law, Sir *Audley* to pay him six years purchase for the premises, and be at all charges in prosecuting his claim before the commissioners under the act of settlement and explanation, or in getting reprisals for any part to be decreed to others; for which purpose *Perry* made Sir *Audley* his attorney and agent, and, by deeds of lease and release, conveyed to Sir *Audley*, and his heirs, for 1200*l.* therein said to have been paid, though in reality 200*l.* only was paid; for which 200*l.* Sir *Audley* was to have the mansion-house and demesne of the *Naule*; and for securing the remainder of the purchase money, Sir *Audley*, by lease, dated the same day, demised all the premises, except the mansion-house and demesnes, to *Perry* for 1000 years, under a proviso to be void whensoever Sir *Audley* or his heirs should pay six years purchase for the lands: And that some years after Sir *Audley* paid *Perry* 400*l.* more, for which *Perry* conveyed to Sir *Audley* lands to that value, at the rate of six years purchase; and, by agreement, kept in his possession 100 acres in the *Naule*, a third part of *Borringtown*, the lands of *Fieningtown, Mersfides, Kendroesfown, Dardistown, Cloughan*, and *Cloughertown*, in lieu of the remaining part of the purchase-money: And that Sir *Audley*, in *February*, 1665, exhibited his claim before the commissioners, setting forth that the premises were allotted to *Benjamin* in satisfaction of a debt due

1797.

decenture of 1685*l.* 1*s.* 3*d.* and that the lands amounted only to 839 acres, which was much less than the two thirds which *Benjamin* was to have by the explanatory act; and in regard the said *Benjamin* was in England, he prayed, if any overplus were found in his possession, that he might have the preference of placing deficiencies thereon; and that this claim was heard in *May*, 1666, and upon proof of *Perry's* title to the premises, the same were decreed to Sir *Audley*, without any saving of the said lease or term of 1000 years: And that Sir *Audley Merwin*, by another deed, in *November*, 1666, confirmed and ratified the term of 1000 years, and covenanted that he would, within 18 months, pass letters patents of the premises, and that he and Dame *Margatha* his wife would make further assurances for the residue of the term, and for *Benjamin Perry's* quiet enjoyment, against certificates and letters patents, sued or to be sued; and that Sir *Audley* in *June*, 1668, obtained letters patent pursuant to the decree, and, whilst the said *Benjamin Perry* was in *England*, fraudulently prevailed with the tenants of *Morejedes*, *Kendroestown*, *Dardistown*, *Cloughan*, and *Clougherstown*, to betray the possession to him, and then pretended the said last mentioned lands had been retrenched, and that he had placed deficiencies on them in his own right, and that he did not get them under *Perry's* title: And that *Benjamin Perry* returned into *Ireland* in 1673, and exhibited his bill in Chancery, to be restored to and quieted in his possession; and that before the cause could be brought to a hearing Sir *Audley* died, leaving the respondent *Hugh*, and others, his executors; against whom the said *Benjamin Perry* revived the suit, and afterwards died, leaving appellants his executors, and devised the purchase-money to due to appellant *Mary*, and his children by her; and that appellant *Mary*, as executrix and guardian, in 1680, revived the suit against the executors of Sir *Audley*, and respondent *Hugh* brought several vexatious suits, and at length, partly by treachery, and partly by open force, turned her out of possession of that part of the estate to which she had undeniable title, and which she afterwards recovered in *Forma Pauperis*, whilst her children were necessitated to come into *England* for some relief and subsistence among their relations, and other charitable people: And that the late war in *Ireland* beginning soon after, nothing could be further done in that suit till after the reduction

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of that country; and then respondent *Mervin* pretending that he had mortgaged these lands, (among many others) to the other respondent, appellants filed their bill in Chancery of *Ireland* against respondents, for an account of the profits, and to be restored to, and quietted in the possession of the lands pretended to have been retrenched: And respondent *Reiley*, by his answer, insisted that he had no notice of appellant's title to the retrenched lands before his mortgage; and respondent *Mervin* insisted, that his father had placed deficiencies of his own on them, and had passed them in distinct letters patent; and the cause coming to be heard in *December*, 1704, the Lord Chancellor decreed, that respondent *Mervin* should not pay, or account for the lands mentioned to be retrenched; and, 12th *December*, 1705, declared appellants ought not to have any relief against respondent *Reiley* as to them lands; and therefore decreed the bill to be dismissed without costs, as to the respondent *Reiley*, in relation to those lands: And from these orders or decrees, so far as the same relate to, or concern the lands supposed to be retrenched, this appeal was brought, and appellants insisted they ought to be reversed, because there was no proof in the cause that the lands were ever retrenched, but the contrary; and that it was apparent by Sir *Audley Mervin*'s claim, that no part thereof was to be retrenched, in regard the whole was short of the two thirds which were to be enjoyed without retrenchment; and no notice was taken in *Mervin*'s decree or patent of any retrenchment: And further, because if the lands had been retrenchable, yet Sir *Audley Mervin* acting as Captain *Perry*'s agent or attorney, ought to have placed Captain *Perry*'s deficiencies thereon: And finally, because, though Sir *Audley* had had never so good a title, yet he, and all those deriving under him, were bound by the lease of 1000 years, and the confirmation in *November*, 1666, after the decree, which though made before *Mervin* had past patent or got the title in law, yet were made good and binding by an express clause in the act of settlement: And appellants having thus good title in both law and equity, respondent *Reiley*'s pretence of being a purchaser without notice was insignificant.

Sam.
Dodd.

The respondent *Mervin*, on the other hand stated, that by the act of settlement made in 1663, the adventurers

1707. {
 turers and soldiers were obliged to claim the estates allotted to them in order to pass patents thereof; and that Captain *Benjamin Perry*, sen. being in possession of 339 acres, 1 rood, and 19 perches of land, in the Convey of *Meath*, in satisfaction of his pay, in *April*, 1665, contracted with Sir *Audley* to sell him those lands, or so much of them as he should pass letters patent of under *Perry*'s title, for six years purchase, Sir *Audley* to pay moreover the year and a half's value to the forty-nine officers, and be at the charges of claiming and passing letters patent, &c. And that accordingly, by lease and release, dated the 20th and 25th *April*, 1665, *Perry* conveyed the lands to Sir *Audley* and his heirs, and Sir *Audley* demised all back again (except the demefne of *Naule*, which were considered as bought for the 200*l.* paid down) to *Perry* for 1000 years, at a pepper-corn rent, as his security for Sir *Audley*'s paying the six years purchase, when the patent should be passed; and that Sir *Audley* soon after paid him 400*l.* more, and had thereupon more of the lands delivered to him, which, with the *Naule*, amounted to about 100*l.* a year: And that the act of expiation was made 20th *October*, 1665, whereby one third part of the soldiers lands was retrenched, and taken from him, in order to pay deficient soldiers and adventurers: And that, 23d *February*, 1665, Sir *Audley Mervin* (as assignee of *Perry*) claimed all the lands, but his claim was rejected as to one third part; and afterwards, in *May*, 1666, under *Perry*'s title, he passed certificate of two parts only, and in *March*, 1668, passed patent thereof: And that Sir *Audley Mervin*, as any other might have done, a year after the retrenched part had been thrown out, placed deficiencies thereon, to the value according to the qualifications of the act, and had a certificate thereof, and letters patent passed to him, and possession accordingly; and at *Perry*'s desire (to save the charges of a new patent) included in his patent a parcel of lands called *Newtowne*, which occasioned a deed to be made between them, dated 20th *October*, 1656, whereby Sir *Audley* declared his name as to *Newtowne*, to be in trust for *Perry*; and in that deed the terms of the sale of the estate, at six years purchase, were recited, and to defend the one thousand years lease against Sir *Audley*'s lady's dower, and other incumbrances, was the sole end of that deed: And that Sir *Audley* finding that *Perry* had over-valued the lands, delivered

1707.

delivered to him when he paid the 400*l.* by at least 5*l.* a year, and that *Perry* had forty acres more in the two thirds than he ought, to the prejudice of the retrenched third, applied himself to *Perry* for redress, which he often promised, but did not; and so things continued till 1673. when Sir *Audley* began to disturb some of *Perry*'s tenants, and then he preferred a bill in Chancery against Sir *Audley*, charging the agreement, and that he had set forth lands to the full value of 100*l.* a year, and that the retrenched third part ought to be in trust for him, and that he had not his full number of acres set out to him for his service, and therefore Sir *Audley* ought to have placed deficiencies of *Perry*'s thereon: And that Sir *Audley*, in his answer, said *Perry* never pretended that he was deficient in his two thirds; and though they lived within a stone's throw of each other, yet *Perry*, for near six years, never made any pretence to the retrenched third part, until Sir *Audley* disturbed his tenants: And that, 7th February, 1673, on *Perry*'s petition, the matters in difference were by order of the Court of Chancery referred to *Thomas Taylor*, and *Henry Osborn*, Esqrs. Officers of the Courts of Claims: and, 8th August, 1674, the arbitrators awarded *Perry* to give Sir *Audley* lands of 4*l.* 4*s.* 6*d.* a year, to make up the 100*l.* a year, and that Sir *Audley* should pay *Perry* 319*l.* 9*s.* 8*d.* and then he to deliver Sir *Audley* all the rest of the lands in possession; but that at Sir *Audley*'s desire (thinking the arbitrators had done him wrong in ordering him but 4*l.* 4*s.* 6*d.* a year) matters were referred back to be reviewed by the arbitrators, and before any award Sir *Audley* died, and left the estate to respondent *Mervin*, and then the executors or trustees of Sir *Audley* revived the suit, and the like referrees as before: And that the referrees made no alteration in their former award, save that they mentioned, that *Perry* had no right to the retrenched lands: And that the executors or trustees thinking that *Perry*, whilst in possession, was in the nature of a mortgagee, 5th April, 1676, preferred a bill in Chancery against *Perry*, for an account of the profits, and charging that the demesne lands were overvalued: And that *Perry* answered, 3d May, 1676, and objected against nothing, save being accountable for the mesne profits, and insisted on the former references and awards, and that he was willing to accept of the 319*l.* 5*s.* 8*d.* and thereupon to reconvey the lands

to

to Sir *Audley Mervin's* trustees, without any reserve or pretence to the retrenched third part: And then *Perry* died, and made appellants executors, who revived the suit: And that, 29th *January*, 1684, the court referred it to a master, to state the value of the demesne lands, and there were never any further proceedings thereon: but, in 1683, respondent *Mervin* mortgaged, amongst other lands, the retrenched lands to one *Rolls*, whole executrix, in 1691, preferred a bill in Chancery against respondent to fore-close, and accordingly had a decree; but before he was fore-closed, procured respondent *Reiley* to pay off Mrs. *Rolls*, and to advance a farther sum, amounting in all to 3100*l.* and that the estate was accordingly made over to *Reiley*, who, in 1702, preferred his bill to fore-close him, and made the executors of *Perry* parties, to have the rest of the lands in their possession, upon paying the six years purchase; and that thereupon appellants, in 1703, preferred their bill against respondents, to have a decree for the retrenched lands, and an account of the rents and profits from 1667; whereto respondents answered, and respondent *Mervin* insisted on the matters aforesaid: And that the cause was heard several days in *November* and *December*, 1704, before the Lord Chancellor of *Ireland* (assisted by the Lord Chief Justice *Dwyne*, and the Lord Chief Baron) who decreed that appellants had no right to the retrenched lands; and that as to the lands for which the 319*l.* 9*s.* 8*d.* was to be paid, appellants were not to account for mesne profits, nor were they to be bound by the account made up by *Taylor* and *Osborn*, but it was referred to a master: And respondent insisted this was just, because the acts of settlement and explanation, had always been expounded to bar all rights not expressly saved in the certificate and letters patents; and that Sir *Audley*, by placing deficiencies on the retrenched third part, made it his own purchase, without any dependence on, or reference to his contract with *Perry*, as any other person might have done.

St. John
Brodrick.

The appellant's bill having been dismissed as to the respondent *Reiley*; he on his part shewed his mortgage, and insisted that that decree of dismissal was just and ought to be affirmed, because he had lent his money without notice of appellant, or Captain *Perry's* pretences to the retrenched lands, or of any trust, either express or implied, under the sanction of the decree of fore-closure, at the suit of Mrs. *Rolls*, and that appellants during

during that first foreclosure suit, made no pretence to the retrenched lands: And that a court of equity never assisted to defeat the title of a mortgage.

Die Veneris, 4^o Aprilis, 1707. After hearing council on this appeal, the Lords ADJUDGED it to be dismissed, and the decrees appealed from, affirmed.

Lords Journ. vol. xviii. p. 313.

1707.

Richard
Turner.

Ralph

1706.

Ralph Wilson, Esq. and Margaret } Appellants.
his Wife, - - - }

George Story, and Catherine his } Respondents.
Wife, - - - }

CASE 73. **T**HE appellants made this case: That *Gamaliel Warter*, seized in fee of lands called *Bilbo* and *Colemon*, and by lease of three lives renewable of lands called *Cullin*, and seised of divers other lands, tenements and hereditaments, in the Counties of *Limerick* and *Tipperary*, in *Ireland*, died in *August*, 1681, leaving two sons, *John* and *Edward*; and that *Edward* possessed himself of the whole estate, pretending his father had made a will in his favour, and, about *June*, 1685, died, leaving issue three daughters, respondent *Catherine*, appellant *Margaret*, and *Anne*, who died an infant, and that *John* survived *Edward*; and that *Edward's* daughters being very young at his death, *Sir Thomas Osborne*, *James Harrison*, and *Alice Osborne*, *Edward's* widow, and daughter of *Sir Thomas*, pretended *Edward* had made a will, 10th *April*, 1685, devising *Bilbo*, and the rest of the inheritance, to respondent *Catherine*; *Cullin* to the appellant *Margaret*; and *Emly* to *Anne*; and made them executors, and entered into the estate, and applied the profits to their own use; and that, in 1698, respondent *Story* married respondent *Catherine*, and, in 1702, appellant *Wilson* married appellant *Margaret*, and thereupon *Wilson* was put in possession of *Cullin* by respondent *Story*, and the pretended executors of *Edward* all declaring it then to be the right of his wife, and appellants enjoyed *Cullin* for half a year; but respondent *Story*, 5th of *February*, 1702, filed a bill in Chancery in *Ireland*, and therein insisted *Cullin* was not deviseable by *Edward's* will; and that in right of respondent *Catherine*, he was intitled to a moiety thereof; and upon the respondent *Story's* affidavit of his three years possession of a moiety in her right, he obtained an injunction directed to appellants: And on the 5th of *May*, 1703, the respondent *Story*, and *Edward's* pretended executors, filed another bill in that Court, setting forth that they had impowered him to manage *Cullin*, and all

all the estate; whereupon he prayed another injunction to be quieted in possession of all *Cullin*, and made another affidavit of his three years possession of the whole, under the title of the said executors; and that by this unfair dealing, appellants were forced to enquire into respondents title, and discovered that *Gamaliel* made no such will as *Edward* had set up, and that appellant *Margaret* had a right to a moiety thereof, as one of the nieces and co-heirs of *John*, *Gamaliel*'s eldest son and heir, wherefore appellants, in 1703, brought their ejectment in the Exchequer for a moiety of *Bilbo* and *Co' enemo-ny*, and upon full evidence obtained a verdict against *Gamaliel*'s pretended will: And that after this verdict, respondents, 27th *October*, 1703, filed a third bill, and made appellants, and the said pretended executors, defendants; charging that *Gamaliel* being seized of *Bilbo*, *Colemeny*, *Cullin*, and other lands, did, by articles under his hand and seal, the 28th of *January*, 1680, upon a marriage to be had between *Edward* and *Alice*, and of 1400*l.* portion, agree to settle all his estate, for securing 300*l.* *per annum*, for their maintenance, during *Gamaliel*'s life, and for a jointure for *Alice* after his death, then all the estate (except *Barndarick*) which was to be settled on *John* (who they pretended was an idiot) was to come to *Edward* and his heirs, charged with 100*l.* *per ann.* jointure for *Gamaliel*'s widow; and that the marriage was had, and the portion paid, and that *Edward* entered into all the estate after his father's death; and by his will devised 300*l.* *per annum* to his wife, and *Bilbo* to his mother for her life, for a maintenance for his daughters, and devised all the estate to the pretended executors for payment of debts; and after debts paid, devised all the inheritance to the respondent *Catherine*, *Cullin* to appellant *Margaret*, and *Emily* to *Ann*; and that, in 1698, respondent *Stary* married *Catherine*, and thereupon the pretended executors put the estate into his hands, and that he undertook to pay *Edward*'s debts; and that appellant *Wilson* had notice of the will, and that he and his father agreed *Cullin* should be subject to the debts, and prayed an injunction to be quieted in *Cullin*, and to stop appellants proceedings at law for the recovery of *Bilbo* and *Colemeny*; and that appellants, in their answer to this bill, denied *John* was an idiot, or that *Gamaliel* ever made such articles, or ever received the marriage-portion; and sayer that *Gamaliel* had made a settlement

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ment precedent to the pretended articles, under which his widow, who outlived both her sons, enjoyed *Bilbo* and *Colenemony* as jointure until her death; and that *Edward* deceived his eldest brother *John*, and denied *Edward* made a will, or if he did, insisted he had nothing to devise, and denied respondent was at any expence in managing the estate, but held *Cullin* as guardian to appellant *Margaret*; and that appellants were no parties to any agreement made with respondent *Story*, and said they had recovered a moiety of *Bilbo* and *Colenemony*, upon a full and fair trial at law, as heirs to *John* and *Gamaliel*; and appellants shewed that that cause was heard 27th *April*, 1705, and though the pretended articles were all *Edward's* hand, and no subscribing witnesses to them, nor were ever delivered or heard of till this suit, and differed materially from those set forth in the bill, and no covenant to convey any estate of inheritance but for life only; and though it appeared *Gamaliel* has made a settlement prior to these articles, and that *Edward* burnt it; and though the witnesses produced on respondents part, were excepted to as executors, legatees and creditors of *Edward*, and so interested, or else were persons of bad characters, and contradicted themselves and one another strangely in their depositions; yet, on the 8th *May*, 1705, the Lord Chancellor decreed a perpetual injunction to stop appellants proceedings at law on their said ejectment, and that decree was signed and inrolled; and appellants insisted this decree was erroneous and unjust, and ought to be reversed, because the decree was founded on the articles of which there was no manner of proof but the similitude of *Gamaliel's* hand, no subscribing-witness, no proof of delivery, no counterpart signed by Sir *Thomas*, and which article varied materially from those set forth in the bill; and in as much as the reality of the articles was contested, it was the right of appellants, and the constant course of equity to leave the same, being matter of fact, to be tried by a jury; and further, because, though the articles had been duly made, they were not sufficient to pass the inheritance to *Edward*, no estate being therein agreed to be limited to his heirs; and further again, because it being proved that *Gamaliel* had made a settlement prior to these articles, and that the same was burnt by *Edward*, the articles ought to have been adjudged invalid in a Court of equity; and because appellants

and

and respondents being co-heirs as well to *Edward* as *Gamaliel* and *John*, and neither of them being purchasers, they stood in equal degree in equity, and a court of equity ought not to disinherit either, or prefer one to the other; and because *Edward's* will was never published, nor proof made of it, but by the similitude of his hand-writing, which was not sufficient to decree upon to the disinheriton of an heir, without a trial at law; and the rather, because, unless *Edward* had the fee-simple under the articles, his last will (though real) could be of no effect; and further, because the depositions of all *Edward's* said pretended executors were read, though it appeared they were legatees and creditors, and in danger of losing their debts and legacies, unless the articles and *Edward's* will were established, which was contrary to natural justice, and the course of all courts of law and equity; and finally, because a perpetual injunction to bind an inheritance, and to establish a disinheriton upon one of the co-heirs for ever, ought not to have been granted upon any doubtful matter, or without, at least, a trial at law, especially in a case where the same co-heir had before prevailed at law, and obtained a verdict in affirmance of her title.

Matt.
Lane.

The respondents shewed, in affirmance of the decree, that *John*, the eldest son, was a man of very weak understanding, and *Edward* the hopes of his family; and that *Gamaliel*, the father, in consideration of a marriage between *Edward* and *Alice*, daughter to Sir *Thomas Osborne*, and of fourteen hundred pounds portion, agreed with Sir *Thomas* by articles under hand and seal, dated 28th *January*, 1680, to settle a jointure of 300*l.* *per ann.* on *Alice*, and 300*l.* *per ann.* for their present maintenance; and after his own decease, to settle on *Edward* all his estate real and personal (except *Barnderick*, worth 30*l.* *per ann.* which he intended for *John* for life, and afterwards for *Edward*); subject to 100*l.* *per ann.* to *Gamaliel's* wife for a jointure: And that the marriage took effect 19th *May*, 1681, and 600*l.* part of the portion, was paid to *Gamaliel*, according to the articles; but he dying suddenly in *August* following, the residue of the portion was paid to *Edward*, who enjoyed the whole estate from his father's death until his own; and, 14th *May*, 1683, made a settlement of the whole estate, and of other lands of his own purchase, to the use of himself for life,

1706. }
 life, remainder to the heirs male of *Edward* and *Alice*, remainder to his right heirs; and to the further use and intent that *Alice*, if she survived *Edward*, might receive 300*l. per annum* out of the rents and profits for her jointure, *Margaret*, his mother, 100*l. per ann.* according to the articles made on *Edward*'s marriage, with provision for raising daughters portions; and that *Edward* had borrowed great sums of money, which he laid out in paying his father's debts, his sisters portions, and improving the lands; and having three daughters, *Catherine*, *Margaret*, and *Anne*, he, 10th April, 1685, by his last will (all of his own hand-writing) directed that all his debts should be paid; and then devised his estate of *Bilbo* to his mother *Margaret*, for her life, in lieu of her jointure; and that his wife *Alice* should receive out of his whole estate (his mother's jointure excepted) 300*l. per annum*, to be paid her by his executors half-yearly, pursuant to a deed of intermarriage; and then devised in these words: Item, it is my will (my mother's and my wife's jointures being thus set apart) that the remainder of my estate, both real and personal, (a competency for the maintenance of my three daughters, or the survivor or survivors of them, only excepted) be immediately applied to the payment of my debts; which being fully satisfied and paid, it is then my will, that my whole estate, both real and personal, be disposed of in manner and form following. (Viz.) *inter alia*, the lands of *Bilbo* and *Calenemony*, (now in question) and other lands, to *Catherine* and her heirs male for ever; the lands of *Cuilin* to *Margaret* and her heirs; and *Emily* to *Anne*, (who died an infant); and made Sir *Thomas Osborne*, *James Harrison*, Esq. and said *Alice*, his executors, and died 17th June, 1685, indebted near 4000*l.* and *John*, his brother, died a month after him; and this being proved, his executors entered, and paid some debts; but the wars soon after destroyed the greatest part of the estate; and that respondents intermarried, 28th April, 1698; and respondent *Story*, in consideration of the devise in *Edward*'s will to *Catherine*, made a settlement on her and their issue; and, 16th December, 1698, by authority from the executors of *Edward*, entered upon the whole estate, received the rents, paid the 300*l. per annum* jointure to *Alice*, (*Margaret*, *Garnetiel*'s widow, being dead,) paid several of *Edward*'s debts, and was then engaged to pay near 1200*l.* more

more of those debts; laid out near 1500*l.* in rebuilding the houses burnt in the war, and improving *Bilbo*, so devised to his wife, and granted long leases thereof, on which the tenants had also improved, and paid also near 800*l.* arrears of rent due out of the lands of *Cullin*, held of the Earl of *Thomond* at 200*l.* *per annum*; and shewed further, that upon appellants intermarriage, appellant, *Ralph*'s father, satisfied of respondents title to the lands in question, by articles, 9th *September*, 1702, agreed with respondent *Story*, that appellant *Margaret*'s estate should be subject to her father's debts, in proportion to what she and her sister the respondent had from their father, and also to her mother's jointure; but that appellants not regarding those articles, made several forcible entries, and denied to pay any part of *Edward*'s debts; and that to prevent this, and to quiet possession, respondents, 15th *February*, 1702, and 5th *May*, 1703. exhibited two bills, one in their own names, and the other in the names of them and the executors of *Edward*, to which appellants did not put in any answers; but, in trinity term, 1703, brought an ejectment for a moiety of *Bilbo* and *Colenemoney*, as niece and co-heir to *John*, and obtained a verdict, in regard the respondent's title was only in equity; and that thereupon respondents, 7th *October*, 1703, filed their present bill, to be relieved upon the marriage-articles and will of *Edward*; and that appellants, to avoid the articles and will, would insinuate that *Edward* the father deceived his brother by a false will; and that *Alice* the mother, Sir *Thomas Osborne* the grandfather, and *James Harrison*, the executors, set up the articles and will of *Edward*, which were not real; and that though respondents had proved them, yet they ought not to be believed; because it will be more for appellant's advantage to claim as niece and co-heir to *John*, than to *Edward* the father; and so disappoint the grandfather *Garnahiel*'s articles, and their father's will, that they might have the estate discharged of their father's debts, their mother's jointure, and have the benefit of respondent's improvements; which was so unconscionable, that after four days hearing the cause, the Lord Chancellor, on the 8th *May*, 1705, decreed respondents the perpetual injunction of that Court to stay appellants proceedings against them at law for *Bilbo*, and other lands mentioned

mentioned in the declaration; which decree respondents insisted was just, and ought to be affirmed, and the appeal dismissed with costs.

I. Jekyll.

Sim. Har-
court.

Die Veneris, 31^o Januarii, 1706. After hearing council upon this appeal, it was ORDERED and ADJUDGED that the same should be dismissed, and the order and decree complained of, affirmed. *Lords. Journ.* vol. xviii. p 222.

✶ This case was misplaced by accident.

John

John Watkins, Esq.

Appellant.

John Price, Esq.

Respondent.

THE appellant stated: That respondent's bill Case 74. against him in the Court of Exchequer, was (amongst other things) to be restored to the possession of certain household goods, sold and paid for; and to have appellant deliver up several bonds wherein the respondent was bound to him and his relations; and to be relieved against a purchase made by appellant from respondent, of his manors of *Gellybryn* and *Water-sione*, in the County of *Glamorgan*: And that appellant, in his answer, insisted that he was an absolute purchaser of those manors, and had paid the greatest part of his purchase-money; and that respondent had absolutely sold him the household goods by bill of sale, and that he had paid for the same; and, to the rest of respondent's demands, submitted to an account: And that the cause was heard in the Exchequer, 30th June, 1703, when an account was decreed of what appellant, *William Watkins* his father, or *Job Watkins* his brother, really paid, either for principal money, interests, or costs, unto or for respondent, and appellant to be allowed interest for the same; and respondent to account for the profits of the manors from such time as the appellant had so purchased; and appellant to pay the remainder of his consideration money, with interest from the time of his purchase; and appellant to account to the respondent for all the household goods: And that the Deputy-remembrancer, 11th June, 1706, made a report *ex parte*, that there was a balance due from the appellant to the respondent 405*l.* 14*s.* and that this report was confirmed *ex parte*, 19th June, 1706, and appellant decreed to pay the respondent said 405*l.* 14*s.* and to do several other acts; which decree was immediately signed and enrolled; and that appellant thus surprised, brought his bill of review; but the court would not open the decree, or relieve appellant, which he insisted the Lords ought in justice to do; because, though the decree ordered appellant interest for what he had paid for respondent's debts;

debts; and it appeared he had paid 307*l.* 19*s.* 8*d.* yet he was allowed no interest at all for the same: And although respondent was decreed to account with appellant for the profits of the manors, and appellant to account for what remained of his purchase money, and interest, yet appellant was charged with the whole purchase-money and interest, although respondent by his bill admitted part of it to be paid, and was not allowed one penny towards the profits: And that appellant moreover stood charged with the value of the household goods, although it appeared by receipts under respondent's hand, that appellant paid for the same: And further, because the final decree had fixed appellant to pay 405*l.* 14*s.* without having the allowances, which the former decree directed; and had the first decree been pursued, and the account fairly taken, it would appear by receipts under respondent's own hand, that the respondent was in appellant's debt.

Sam.
Dodd.

The respondent on his part stated, that in *Easter Term*, 12 William III. he brought his bill in the Exchequer against appellant, setting forth that he had let several tenements to appellant at 28*l.* 10*s.* *per ann.* and had granted appellant several coal mines for ten years, paying 2*l.* 6*d.* for every weigh of coals; and that appellant was indebted to him for goods sold, monies received, and upon several other accounts; and that appellant and his brother, being bound for respondent 200*l.* and 55*l.* lent by appellant's father, respondent had for the security of these monies confessed a judgment for 500*l.* to appellant's father and brother: And that appellant, as well by the rent of the lands which he held from the respondent, and by money due for coals, timber, and other goods, and by several sums of money paid to him by respondent and his order, had received more money than would satisfy the judgment, and all monies due to appellant, and that therefore the judgment ought to be discharged; but that appellant had nevertheless extended respondent's lands upon the said judgment, and had, also by surprise got a conveyance from him of the royalties of the manors of *Gillibon* and *Walterstone*: And therefore prayed that appellant might account with him, and that the judgment might be set aside, or satisfaction acknowledged, and respondent generally relieved: And that appellant in his answer, submitted to an account, and

and that witnesses were examined, and the cause heard 30th *June*, 1703, and it was decreed that both parties should go to an account, and appellant be allowed what he, or his father, or his brother, had paid for the respondent with interest, and respondent allowed what was due to him from time to time, for his rent, and for moaies received by appellant for his use, and what was due for coals, timber, and otherwise, and all parties to have just allowances: And that both parties attended the Remembrancer, who, after several delays on appellant's part, reported as stated by appellant, who put in exceptions, and it was re-referred; and on second report 405*l.* 14*s.* was reported due to respondent after all just allowances, and this report confirmed without any exception, and appellant decreed to pay said 405*l.* 14*s.* and to release the judgment: And that appellant afterwards stood out proceis of contempt for not performing the decree, till he was arrested upon a commission of rebellion, and thereupon gave security to perform the decree; but, for further delay, brought his bill of review, to which respondent demurred, which upon arguing in *Michmas* Term, 1707, was allowed, and the decree confirmed; and respondent insisted that the decree was just and reasonable, and ought not to be reversed, because the objection made in the appeal, that respondent was allowed a sum of money for goods for which the appellant had paid, and that there was no proof to warrant such a charge, was not one of the errors assigned in the bill of review, and appellant ought not to be permitted to make any objection to the decree which was not assigned for error in the bill of review: And further, because even that objection was a mistake in point of fact, for it appeared by appellant's answer, and by proofs in the cause, that he had those goods, and there was no proof that he paid for them: And further, because the errors assigned by the bill of review, were not objections to the decree, but to the report, that several sums, which appellant pretended ought to have been allowed him, were not allowed; and though there had been any such mistake in the report, yet respondent insisted that could not be assigned for error in a bill of review; because the only way to rectify mistakes in the report, was by taking exceptions thereto, which in this case appellant had done; and that the report had been confirmed, and that after

a report

1707. { a report was confirmed, no exceptions could be made thereto by bill of review, or otherwise: And further, because every error assigned against a decree by bill of review, ought to appear in the record itself; and it cannot appear to the Court, whether the allowances made by the report were just and reasonable or not, because the proofs in the cause, which are the ground and foundation of such allowances, are not entered upon the record.

James
Groves.
Con.
Phipps.

Vin. iv.

414. *Die Jovis, 8^o Januarii, 1707.* After hearing council on this appeal, it was ADJUDGED by the Lords pl. 5, 6. that the same should be dismissed, and the decrees, re- 2 Eq. Ab. ports, orders, and proceedings of the Court of Ex- 175. chequer complained of affirmed; and that appel- c 12. lant pay respondent 10*l.* for his costs. *Lords Journ.* vol. xvii. p 404.

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Job Allibon, Gentleman, and *Nevil* } Appellants.
Ridley, Esq. }

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Her Majesty's Attorney General, - Respondent.

THE appellants made this case: That *Mary Case 75.*
Braitbwait and Sir *Stafford Braitbwait*, 12th

January, 1674, in consideration of 1000*l.* lent by Sir *Henry Hunlock*, Bart. demised the manor and lands in *Catterick*, in *Com. Ebor.* to *John Jeffs*, (as trustee for Sir *Henry*) to hold for 1000 years, under a proviso to be void on payment of 1060*l.* and Sir *Stafford Braitbwait*, 18th and 19th *October*, 27 Car. II. conveyed his interest therein to *Mary Braitbwait* and her heirs, and the term was afterwards vested in Lord Viscount *Fauconberg*, as a security for 3000*l.* lent by him; and in February, 1680, *Mary Braitbwait* devised several farms (being the premises now in question) to Sir *Roger Strickland* in tail male, with remainder to *Robert Strickland* for his life, remainder to his first and other sons in tail male, remainder in fee to Sir *Roger*, on condition that he should pay off the 3000*l.* to Lord *Fauconberg*, and other sums therein mentioned: And, 24th *March*, 1681, Lord *Fauconberg*, in consideration of 2500*l.* paid him by Sir *Roger Strickland*, and of 500*l.* paid him by *Richard Allibon*, Esq; assigned the premises to *Allibon* as a security for payment of said 500*l.* and interest; and, 10th *March*, 1682, *Richard Allibon*, in consideration of 500*l.* paid him, and Sir *Roger*, in consideration of 3000*l.* paid him by *Edward* and *Thomas Ange* (trustees for *Robert Strickland*) absolutely assigned the premises to them for the remainder of the term: And, 11th *March*, 1682, declared the trust; and *Robert Strickland* immediately took possession, enjoyed the premises, and received the rents; and, 2d *June*, 1685, in consideration of 500*l.* lent *Robert Strickland* by appellant *Job Allibon* and *John Smith*, the *Ange*s, by his direction, assigned to *William Gerard* and *Christopher Maddison* (trustees for *Allibon* and *Smith*) and, 13th *June*, 1685, in consideration of 500*l.* more lent by them, *Robert Strickland* confirmed the premises to *Gerard* and *Maddison*, as a security for both sums and interest, and *Gerard* and *Maddison* both afterwards died:

died: And, in 1690, Sir *Roger Strickland* was indicted and outlawed for treason, and, by inquisition, found seized in fee of the lands in question, and administration to *Maddison*, the surviving trustee, being granted to *Dixwell Hungerford*, a plea was in his name put in to the inquisition, and judgment given for *Hungerford*, which was afterwards affirmed upon a writ of error in the Exchequer: And in *Hillary*, 13 William

2 Lutw.
996.

III. a bill was brought in the Exchequer against *Robert Strickland*, appellant *Alliben*, and others, in the Attorney General's name (*int. al.*) for a discovery, whether the assignment of the 10th *March*, 1682, was absolute, or a mortgage only, or a trust for Sir *Roger*, and what consideration was paid, and to have a discovery of the consideration of the mortgage to *Gerard* and *Maddison*, and whether they or any of the defendants were trustees for Sir *Roger*, and that the crown might redeem if any thing was due: *Robert Strickland*, long before the bill brought in, went into *France*, and was never served with process to appear, nor did he appear, or answer, nor could any commission be obtained, or executed during the war, and he was for all that time unable to travel; but an order was made, 15th *July*, 1704, that the leaving process against him with *Crofts* (who received the rents) with Mr. *Butler* (the mortgagees attorney in the Exchequer) and with one of the tenants of the lands in question, should be good service of *Robert Strickland*, and for want of his appearance a sequestration was awarded: And that the other defendants answered, set out their title, and denied any fraud, or knowledge of any trust for Sir *Roger Strickland*; and, 17th *February*, 1704, *Dixwell Hungerford* assigned to appellant *Ridley* a moiety of the mortgaged premises and money due, in trust for appellant *Alliben*; and *Hungerford* afterwards dying, administration of the goods of *Maddison* unadministered by him, was granted to *Ridley*, who became thereby a trustee for the other moiety, also for the appellant *Alliben*: And the cause was heard, and the depositions of several witnesses (then dead) examined in a former cause, on the same attainer and inquisition, and for the same lands, between his late Majesty's Attorney General, and some of the defendants, were offered to be read; and although by order of the same court, the depositions in the former cause were, allowed to be read as evidence at the hearing, yet appellants were not permitted

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permitted to read these, and so were deprived of part of their necessary defence; and although *Robert Strickland*, under whom appellants claim was the principal person concerned, and had not appeared or answered, yet the Court, 13th November, 1707, decreed that the issues following should be tried at the bar of the said Court, by a *Middlesex Jury*, viz. First, whether the indenture of the 10th March, 1682, was duly executed, and by whom, and to whom and when, and whether the same was an absolute purchase, or a mortgage only for any and what sum, and to whom, and when payable, and whether the sums of 500*l.* and 3000*l.* therein mentioned, or either and which of them, or any and what part thereof were really and *bona fide* paid, as the consideration of said indenture, and by whom and to whom, and when and whether the sales made at the bottom of the said indenture were made before the execution thereof by all the parties thereto, or any and which of them: Second, whether after, and notwithstanding the said indenture of 10th of March, 1682, there did remain any, and what estate, trust or interest for the said Sir *Roger Strickland*, in the said term of 1000 years, and the lands therein mentioned, or any and what part thereof, and to what yearly or other value at or after the attainder of Sir *Roger Strickland*: And third, whether appellant *Allibon* and said *John Smith*, or the said *William Gervard* and *Christopher Maddison*, in the indentures of the 2d and 13th days of June, 1685, named, or either and which of them, for or upon the account of the appellant *Allibon* and the said *John Smith*, or either and which of them did at any time, and when, really and *bona fide* lend and pay to *Robert Strickland*, or to any other, and whom for his use, the two sums of 500*l.* in the said indentures mentioned for, and as the real considerations for making and executing said indentures, or either and which of them; and whether said indentures, or either and which of them, were really and *bona fide* made and executed by all or any, and which of the parties thereto; and when, and whether the interest and trust for the appellant *Allibon* and the said *Smith*, or either and which of them (if any such was) did subsist, and was in being for them, or either and which of them, and for what sum or value, at the time of exhibiting the bill in the said cause, and putting in the answers thereto, and whether the

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the appellant *Alliben* and the said *Smith*, or either of them, or any other, and what person for them or either of them, before the supposed time of lending of their money, had any notice of any interest or trust in the said premises in *Catterick* for the said *Sir Roger Strickland*: And 4th; Whether the indenture of the 17th of *February*, 1704, mentioned in appellant *Ridley*'s answer to be made by the said *Dixwell Hungerford*, to the appellant *Ridley*, was really and *bona fide* executed, and by whom and when, and for what consideration, and when, and to whom, and by whom paid, and whether any and what trust or interest, and to what value, for the appellant *Ridley*, or any other, and whom did subsist, and was in being at the time of exhibiting the bill in the said cause, or putting in the appellant *Ridley*'s answer thereto: And this decree appellants insisted ought, as far as it concerned them, to be reversed, because they were not permitted to read the depositions of witnesses in the former cause (since dead) by which several matters directed would have been evident to the Court: And because the order of 15th *July*, 1704, for service of the subpoena against *Robert Strickland*, and upon which they proceeded to sequestration, was inconsistent with the rules and practice of a Court of Equity, and not a sufficient foundation for such contempt; and that *Robert Strickland* not having appeared, nor being in Court, nor brought to hearing, the Court ought not to have made any decree against appellants, who were only mortgagees under him: And because, after full proof of payment of the money lent by appellant *Alliben* and by *Smith* to *Robert Strickland*, issues were directed to try those very facts, though there was no proof on the part of the Attorney General to render those payments in the least suspicious or doubtful: And because appellants ought not to be decreed to try the said issues, or to make out *Robert Strickland*'s title under the deed of the 10th of *March*, 1682, to which they were strangers, nor ought any issues to have been directed touching the same, *Robert Strickland* being no party; and insisted that no issue or verdict, or decree thereon as against *Robert Strickland*, could bind him, he being no party thereto; so that the appellants could not be indemnified against him, but were accountable to him at his pleasure, and so likely to be doubly vexed for the same matter: And further, that the issues directed were

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so multifarious, and contained many particular inquiries into facts done many years since, to which appellants were strangers, that it was not possible for them to make out the same: And further, that there did not appear any title in the Crown, whereon to found a decree for a redemption, as against appellants: And finally, that appellants *Allison* and *Smith* were real mortgagees without notice of any fraud or trust between *Sir Roger* and *Robert Strickland*, and ought quietly to enjoy under their title, which had already been adjudged good in law in that Court.

J. Pratt.
C. Phipps

On the part of the Attorney General it was stated, that *Sir Roger Strickland* was by outlawry attainted of high-treason, in *October*, 1689; and that, in 1690, a commission went out to enquire of his estate; and by an inquisition taken thereupon, it was found that *Sir Roger Strickland*, at the time of the treason, was seised in fee of the manor of *Thornton Briggs*, in the County of *York*, and of the tythes in *Helpsby*, and of twelve farms in *Catterick* in the said County; and the same were accordingly seised into the hand of the Crown: And that thereupon the agents for *Sir Roger* put in a plea (in the name of the late Lord *Falconbrigg*, and others) for the said manor of *Thornton Briggs*, and of the tythes of *Helpsby*, of a lease for 1000 years, for payment of *Sir Roger Strickland's* debts; but that deed was on a full trial at bar found fraudulent, and contrived to avoid the forfeiture to the Crown: And that as to the twelve farms, *Sir Roger Strickland*, by his agents, in the name of *Roger Crofts* and *Roger Woodcock*, put in a plea of the remainder of a term, pretended to be granted to one *Mary Maddison*, to avoid the Crown title; which plea, upon debate, was found to be void in law; and that thereupon another plea was put in to bar the Crown title, in the name of one *Dixwell Hungerford*, a nominal person, by the agents and servants of *Sir Roger Strickland*, of the remainder of the said term of 1000 years, granted and conveyed to *Hungerford* (as was pretended) which being allowed by the Court, the Attorney General preferred the bill; and that issues were decreed as stated by appellants; and this decree it was insisted was just, because the depositions could not by law be read, being taken in another cause, and wherein the matters in question were not in issue; and that the issues were right, although

Repeal

1707.

Robert Strickland would not appear, because the order for leaving process was regular, and agreeable to the rules and constant course of Equity, and a sufficient foundation to carry on the contempts against him; for otherwise, *Robert Strickland's* keeping in *France*, would defend Sir *Roger Strickland's* estate; and insisted that there was great need of a trial at law, the facts being controverted and doubtful; and it was never before objected, that a Court of Equity had done amiss in directing matters of fact to be tried by a jury; and that the issues contained apt and proper matters, wherein the appellants were concerned; and that by the attainer a good title was vested in the Crown to redeem the premises, if any thing be due to appellants, and that appellants were not hurt in having their principal and interest paid them, if they were honest mortgagees.

Sam.
Dodd.

Die Mercurii, 3^o Martii, 1707. After hearing council upon this appeal, it was ADJUDGED by the Lords that it should be dismissed, and the decree complained of affirmed. *Lords Journ.* vol. xviii. p. 493.

Attorney

1707.

Attorney-General, at the Relation of
Littleton Burton, John Carter,
William Ailee, and others, in } Appellants.
 behalf of themselves, and the
 rest of the Inhabitants of *Ham-*
mersmith,

The Lord Bishop of *London,* *Philip*
Dwight, *Michael Hutchin-* } Respondents.
son,

THE appellant stated, that the *Chapel of Hammersmith* in the parish of *Fulham, Middlesex,* was erected at the charge of the inhabitants who gave the entire ground, save only a very little piece of the waste of the manor; and that before consecration the vicar of *Fulham,* and inhabitants of *Hammersmith,* entered into articles with this preamble: "For avoiding all controversies and differences in time to come, the vicar on the one part, and the inhabitants on the other, declare, agree and accord, that the inhabitants of *Hammersmith* perpetually for the time being, shall find and maintain a curate at their own costs and charges, repair their *Chapel,* be liable to the reparations of the *Church of Fulham,* and pay all their dues to the *Church of Fulham,* and the vicar be discharged from the exercise of his ministerial office in the said *Chapel.*" And that the *Chapel* was consecrated by *William Laud,* Bishop of *London,* 7th June, 1631, and that the inhabitants had always elected their ministers or chaplains ever since the *Chapel* was created, and that the minister's only maintenance was the voluntary contribution of the inhabitants, except 10*l. per ann.* chargeable upon an house in *Hammersmith* given by one *La Gooche,* ten shillings *per ann.* chargeable upon half an acre of land given by *Stephen Burton,* ten shillings *per ann.* for a sermon preached on *New-Year's-Day* by *Nathaniel Dancer,* all inhabitants of *Hammersmith;* all which legacies were given many years after the *Chapel* was built; and that Mr. *Wade,* the last

last curate, was chosen by the inhabitants in 1662, and officiated forty-five years, and till he died in *November*, 1707; and that he had received the voluntary contributions of the inhabitants, obtained a licence from Bishop *Sheldon*; which licence was approved by Bishop *Hinchman*, and confirmed at three several visitations by the present Bishop of *London*: And that the inhabitants, in *November*, 1707, immediately on *Wade's* death, and again in *November*, 1708, unanimously elected *Littleton Burton*, minister, (who had officiated for seven years before, during *Wade's* indisposition, with the express consent of the present Bishop of *London*;) but the present Bishop of *London* set up a right to nominate a minister, on pretence of a reservation made in the consecration of the *Chapel* by Bishop *Laud*, and denied the inhabitants right to elect a minister, and granted a licence to respondent *Hutchinson*, to be curate of the *Chapel*; and that respondent *Dwight* was vicar of *Fulham*; and that appellants, in *Easter* term, 1709, exhibited their bill in the *Exchequer* against respondents, for settling the right of the inhabitants, to nominate and confirm *Burton* in the curacy of the *Chapel*, and prevent disputes in future: And that respondents answered, and witnesses were examined on both sides; and on hearing the cause, 14th *February*, 1709, the bill was dismissed without costs; which appellant insisted was erroneous, because the inhabitants had no other method to have the right established and confirmed; and the proofs in the cause were sufficient to intitle the appellants to a decree.

Jo.
Howles.
Sam.
Mead.

The respondents on the other hand stated: That the town of *Hammer-smith* was within and part of the parish of *Fulham*, which was a rectory, of which the Bishop of *London* was patron, with a vicarage endowed, appendant to the rectory, in the diocesis of *London*: And that, in 1629, the inhabitants of *Hammer-smith* expressed their desire, at their own costs, to erect a *Chapel* for their ease, and applied to Dr. *Cuet*, then vicar of *Fulham*, for his consent, and some writing was made between him and the inhabitants; whereby it was agreed, that all the vicar's rights should be preserved, as if the *Chapel* were not; and that the inhabitants should find and maintain at their own costs and charges a curate, but no certain maintenance was thereby agreed for the curate:

ate: And that application was made to the then Bishop, and the agreement laid before him; and he was willing to encourage the erecting of such *Chapel*; and for that purpose gave 9 rood and 3 feet of land from north to south, and 3 rood from east to west, out of the manor of *Fulham*, of which all the east part of the *Chapel-yard* consisted, and on which all the chancel, and part of the body of the *Chapel* was erected; but insisted to reserve to the Bishop for the time being, the right to name the curate of such *Chapel*, and that a certain maintenance should be established for him; which was agreed to, and the *Chapel* erected, and consecrated; and in the instrument of consecration, 7th *June*, 1631, the right of naming the curate was expressly reserved to the bishop and his successors; and a maintenance of 3*ol. per annum* provided for the curate, and the vicar of *Fulham*'s rights were also preserved. And that the inhabitants, who signed the articles with the vicar, were witnesses to that instrument, and that, 13th *July*, 1631, pursuant to the terms expressed in the act of consecration, the then Bishop nominated *James Dent* to be the first curate, who continued so till 1647, when he died: And that in 1662, after the restoration of King *Charles II.* *John Wade* was named curate by the then Bishop; and died in *November*, 1707, when the present Bishop nominated respondent *Hutchinson*, who, with the consent of the inhabitants, at his own costs, erected a gallery in the *Chapel*, which cost him 12*l.* and that *Hutchinson* had quiet possession until *November* 24th, 1708, when some of the meaner inhabitants, in a disorderly manner, pretended to chuse *Burton* to be curate, since which there had been very great disturbances in the *Hamlet*: And that there was no election of any curate by the inhabitants entered in any of the parish books, though there were of clerk and sexton; and that therefore the decree of *Edward* dismissal was just; for that the Court of *Exchequer* Northey. had no power to decree what was prayed for in the Henry bill, and for that the right of naming the curate was Box. vested in the Bishop.

Die Sabbati, 1^o *Aprilis*, 1710. After hearing council on this appeal, the question was first put, "whether this decree shall be reversed?" and it was

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Cases in Parliament.

{ 1710. } was resolved in the negative; and then ORDERED
and ADJUDGED by the Lords, that the appeal be
dismissed, and the decree appealed from affirmed. *Lords*
Journ. vol. xix. p. 137.

It appears by a manuscript note on the printed cases, that this decree was affirmed by a majority of one.

Littleton

Littleton
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1711.
}

Littleton Burton, John Charwood, } Appellants.
William Vanquier and others, }

The Lord Bishop of London, and } Respondents.
Michael Hutchinſon, Clerk, - }

THE parties ſeverally ſtated, as in the foregoing Caſe 77. caſe is ſtated: And now appellants ſtated further, that the respondents, in *Michaelmas* term laſt, exhibited their bill in *Chancery* againſt appellants, for ſettling the right of the Biſhop in the nomination of a curate to the *Chapel*, and for confirming reſpondent *Hutchinſon* in the curacy, and all the profits thereof, and to oblige appellant *Burton* to account for the profits, and that appellants had answered, and witneſſes were examined on both ſides; and that on hearing the cauſe the 7th *May*, before the Lord Keeper, he decreed the right of nomination to be in the Biſhop and his ſucceſſors, and reſpondent *Hutchinſon* to be quieted in the curacy; and appellants, *Burton* and *John Charwood*, the *Chapel-warden*, to account for the profits received, and to be examined upon interrogatories for the diſcovery thereof, and to pay coſts. Which decree, appellants conceived, deprived the inhabitants of their right of nominating a curate, and deſtroyed the articles of agreement; and complained that as to the account the decree was ill founded, becauſe the profits appellants were decreed to account for, were only voluntary contributions: And inſiſted that the proofs in the cauſe were not ſufficient to eſtabliſh a right in the Biſhop, and that ſeveral of them ought not to have been admitted; and that respondents bill ought to have been diſmiſſed.

John
Pratt.

On the part of respondents it was ſhewn: That appellant *Burton* and others had exhibited the information in the *Exchequer*, and that that cauſe was heard, and the bill diſmiſſed; and that appellant had appealed to the Lords, who affirmed the diſmiſſion: And then it was apprehended all matters would have been quiet; but that pending that appeal *Burton* and his accomplices had gotten poſſeſſion of the *Chapel*, and made uſe thereof in a profane and riotous manner, and that the Lords ordered the ſheriff of *Middleſex* to raiſe his *Posſe*

Comitatūs,

D d 2

1711.

Comitatus, and the serjeant at arms, to deliver possession of the *Chapel* to the respondent *Hutchinson*, and that he was accordingly restored; but that *Barton* and his accomplices had notwithstanding, in a clandestine manner, got into the *Chapel*, and continued in it in a riotous and tumultuous manner, and kept respondent *Hutchinson* out by force and violence, and had ever since set a guard upon, and in the *Chapel*; and that the Bishop and respondent *Hutchinson* had thereupon exhibited their bill in *Chancery* against appellant, to establish the Bishop's right of nominating the curate, and to quiet respondent *Hutchinson* in the curacy, and that appellants might account for the profits; and that the decree stated by appellants was made on the hearing, which respondents insisted ought to be affirmed, and the appeal dismissed with exemplary costs: And respondent shewed, that the gentlemen who signed the present appeal were not appellant's council in *Chancery*, and that those who were appellants council there refused to sign it.

Edward
Northey
Henry
Box.

Die Veneris, 18^o May 1711. After hearing council on this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the decree complained of affirmed; and that appellants pay respondents the sum of 50*l.* for their costs in this house. *Lords Journ.*
vol. xix. p. 304.

Michael

{
1710.
}

*Michael Baker, Richard Philips,
Nicholas Goodwin, Richard Maple-
toft, Elizabeth and Jeffery Good-
child, William Smith, John Barnes,
and Elizabeth Edwards, Widow,
Creditors of his Grace George
late Duke of Bucks, deceased,
on behalf of themselves and se-
veral other subsequent Creditors
of the said Duke,* } Appellants.

*Charles Austin, surviving Executor
of William Cherry, Esq. deceased,
Robert Browne, Executor of
Elizabeth Browne, Widow, de-
ceased, and Administrator de
bonis non of Thomas Browne, de-
ceased,* } Respondents.

THE appellants made this case: That *George*, late Case 78.
Duke of *Buckingham*, in 1671, 1674, 1675,

1676, conveyed all his estate to the Bishop of *Rochester*,
Sir *Robert Clayton*, and Major *Wildman*, in trust, to pay
his debts; and to gain further credit with his trade-
men, and servants, informed them he had so settled his
estate, that his then and future debts would be thereout
paid; and by his letters, 19th *November*, 1675, and
17th *March*, 1676, to Major *Wildman*, directed him
to pay out of the said trust what was then or should
be afterwards due to his tradesmen and servants; and,
to prevent any pretence not to pay them, by his deed-
poll, 24th of *August*, 1676, indemnified his said trust-
tees for any payment they should make, contrary to
former trusts. And, in *Hilary* term, 1682, appel-
lants *Baker* and *Philips* exhibited their bills in
Chancery against the Duke and his trustees, to be paid
their debts; and the Duke was in contempt to a seques-
tration, for want of an answer. And that Major
Wildman in his answer, *May* 25th, 1683, acknow-
ledged he received the Duke's letters for payment of
his tradesmen and servants, and had assured them they
should

should be paid out of the trust-money. And that *Cherry* and *Browne*, pretending the Duke, by deeds of the 21st *December*, 1680, and the 16th of *May*, 1681, appointed his trustees, after several other trusts, to stand seized to the use of *Cherry* and *Browne*, for payment of 10,000*l.* and other sums they should lend, with interest, did in *Trinity* term, 1682, exhibit their bills in *Chancery* against the said Duke and his trustees, for payment of their debts. And that the cause was heard 6th *March*, 1682, and re-heard 23d *May*, 1683, and referred to Sir *John Heskins*, a master, to take an account of what was due to them: And that the said trustees should sell such part of the trust-estate as the Court should direct for payment thereof; and that the master, 13th *July*, 1683, reported due to *Browne*, for principal and interest, 43,432*l.* 18*s.* 3*d.* and to *Cherry* 10,272*l.* 3*s.* 5*d.* And, *November* 13th, 1684, it was ordered in that cause that interest should be made principal, and to carry interest. And *February* 5th, 1684, in the same cause the Court declared *Cherry* and *Browne* should have interest for their interest, when it was a stated sum. And *July* 25th, 1695, in the same cause, it was ordered that *Cherry* and *Browne*'s debt should be first paid; and 14th *November*, 1706, it was ordered that the master should state the priority of the creditors debts, and how much of such creditors debt had been made up by interest, and interest upon interest, and costs; and the several decrees and proceedings by such creditors: And 26th *October*, 1708, the master was further ordered to state the nature of the several conveyances from the Duke to his trustees, for payment of his debts; and the nature of the several conveyances, and securities made by the Duke, and what had been done thereon: And that the master had made two reports, one dated *July* 3d, 1708, and the other *June* 10th, 1709, viz. that there was due *October* 27th, 1694, to appellant *Baker* 206*yl.* 19*s.* 11*d.* *November* 27th, 1694, to appellant *Philips* 848*l.* 11*s.* 4*d.* *May* 20th, 1697, to *Goodwin* and others 586*yl.* 16*s.* 6*d.* *February* 19th, 1694, to *Goodchild* 455*l.* 16*s.* 6*d.* *July* 5th, 1697, to *William Smith*, *Barnes & al.* 345*l.* 1*s.* 7*d.* *July* 17th, 1708, to *Elizabeth Edwards* 226*l.* 9*s.* 9*d.* and 28th *October*, 1709, the special matter of these reports came to be heard before the late Lord Chancellor, and the several orders for making *Cherry* and *Browne*'s interest to carry interest, being stated in the report

1710.

report of July 3d, 1708, and that the interest of such interest amounted to above 12,500*l.* and that the said decrees were signed and inrolled, his lordship declared he could not give appellants any relief, as to this allowance of interest upon interest: And appellants insisted the orders for interest upon interest should not affect them, for that appellants debts were contracted in confidence and credit of the trust the Duke had created for payment of his debts, and of the letters sent by him to Major *Wildman*, directing his servants and tradesmen to be paid out of such trust, and that these letters were antecedent to any money lent by *Cherry* or *Browne*, and that the debts of some of the appellants were contracted before *Cherry* and *Browne*'s debts, and all in confidence of the known trust created by the Duke for their payment: And appellants shewed that appellants *Baker* and *Philips* had obtained a decree 25th July, 1693, for their debts, founded upon the Duke's orders of November 19th, 1675, and another order without a date to Major *Wildman*, and on the Duke's deed-poll of August 24th, 1676. And that appellant *Goodchild*'s father, upon the same orders, July 9th, 1694, obtained a decree for his debt: And that by the payment of interest upon interest, appellants debts, though in their nature favoured in law and equity, being some for wages and others for the Duke's necessities for his family and table, would be intirely unpaid, and appellants and many others of the Duke's servants and creditors, and their families, ruined; and if such interest upon interest should be allowed, *Cherry* and *Browne* would yet have their debt; and their principal and interest for about twenty-six years at six *per cent. per annum*, and about 1700*l.* for their costs. Wherefore appellants appealed from such part of the decrees, orders, reports, and proceedings mentioned in the report of July 3d, 1708, by which more than 12,500*l.* interest upon interest was allowed to *Cherry* and *Browne*, or their representatives, and from the order made October 28th, 1709.

G. Paun-
cetorpe.
Spencer
Cowper.

The respondents, in affirmance of the decree, stated, that *George* late Duke of *Buckingham*, by indenture, dated 21st December, 1680, mortgaged his whole estate, then in the hands of his trustees, to secure 5000*l.* then lent by *Cherry* and *Browne*, and interest, and such further sums as they should advance: And by another indenture, dated 16th

16th May, 1681, charged his whole estate with the 5000*l.* as also the further sum of 25,000*l.* lent to him by *Cherry* and *Browne*, and interest, and directed his trustees, by sale or otherwise, to raise and pay the same, and such further sums as they should advance; and that in June, 1682, *Cherry* and *Browne* exhibited their bill in *Chancery* against the Duke and his trustees, to have their debts raised and paid out of the Duke's estate, and, 6th March, 1682, obtained a decree accordingly; and upon the re-hearing of the cause, 23d May, 1683, it was decreed that the master should compute the debt and costs, and that the trustees make sale of sufficient part of the estate to satisfy them; and that Sir *John Hogkins*, 13th July, 1683, made two reports, and certified due to *Cherry* 10,272*l.* 3*s.* 3*d.* and to *Browne* 43,433*l.* 13*s.* 7*d.* for principal and interest to the 16th of July, then next following: And that *Browne* being a scrivener, great part of the money reported due to him was the money of his clients, entrusted to him to dispose of upon good securities: And that *Browne* and *Cherry* not being able to receive the money so reported due, upon application to the Court, 13th November, 1684, obtained an order that the master should compute interest for the sums from the time they were reported due for twelve months, and such interest to be made a principal sum, and to carry interest from that time; and 5th February, 1684, on hearing council on both sides, the Court declared the plaintiffs ought to have interest for their interest, when it was a stated sum: And that *Browne* shortly after dying, his widow and administratrix was forced to borrow money at interest to pay off interest money due to several of her husband's creditors, and to pacify others was obliged to execute several declarations of trust of several sums, part of the money so reported due to her husband, particularly one declaration to Sir *Robert Sawyer*, Knight, deceased, for 6000*l.* which declaration was vested in *Thomas Earl of Pembroke* and *Montgomery*, in trust for Sir *Constantine Phipps*, then Lord Chancellor of *Ireland*, to whom there was due thereon above 2300*l.*; and that *Cherry* and Mrs. *Browne* were able to obtain little fruit of the decree during the life of the Duke, who insisted upon his privilege; but after his death, in April, 1687, they revived proceedings against the Earl of *Buckingham*, the Duke's heir at law, the Dutchess of *Buckingham*, his widow, and

1710.

and his trustees: And that since the order of 5th February, 1684, no sum was ever stated by the said master upon Mrs. *Browne's* account, till 3d August, 1693, when Sir *John Hopkins* certified due to her 69.493*l.* 7*s.* 3*d.* nor upon *Cherry's* account till 4th August, 1696, when the master certified due to him 9706*l.* 8*s.* 8*½d.* And upon the same, 4th August, 1696, certified due to Mrs. *Browne*, (all allowances made for money by her received) 36736*l.* or 11*d.* and that the decree, reports and orders for confirming them were duly signed and inrolled, and several manors and estates of the Duke, at the prosecution and sole charges of *Cherry* and Mrs. *Browne*, sold, and the purchase money in part applied to discharge prior incumbrances upon his real estate, and in part towards sinking and satisfying part of the debts due to *Cherry* and *Browne*; who by an order, 17th July, 1695, were to be paid before appellants and other the Duke's creditors: And that the late Lord Chancellor *Cowper*, 14th November, 1706, on motion on behalf of several creditors of the late Duke, ordered the master to state the several claims of such creditors as remained unpaid, and their priority, and how much of each debt had been made up by interest and interest upon interest and costs, and the several proceedings had by the creditors: And that the master accordingly made his report, 3d July, 1708, and stated the debt remaining due to Mrs. *Browne* with interest upon interest to be 1586*l.* 11*s.* 7*½d.* And the debt due to Mr. *Cherry*, with interest upon interest, to be 1650*l.* 14*s.* 5*d.* And, 16th October, 1708, the Lord Chancellor on a hearing on the report, ordered that it should be referred back to the same master, to state the nature of the conveyances from the late Duke, relating to the trust for payment of his debts, and the nature of the securities and appointments made by the Duke to or for his creditors upon any part of this estate, and the proceedings had thereon, and how the creditors interest stood at the time of the several decrees; and that the master accordingly made his report 10th June, 1709, and the matter of both reports came to be heard 28th October, 1709, and on hearing council on all sides, and full consideration had, the Chancellor declared that the interest upon interest computed by the master for the several debts in his said report of the 3d July, 1708, mentioned, ought to stand and be allowed, and did therefore order the same should be absolutely confirmed:

1710. }
 affirmed; which said orders for allowance of interest upon interest, respondents insisted were just and reasonable; because by the constant rule and practice of Courts of equity, all stated sums do carry interest, especially when done by the masters, under orders for that purpose: And shewed, that Sir *Robert Gayer*, a creditor of the late Duke, obtained a like order for allowance of interest upon interest, which was confirmed after great contest by appellants *Baker* and *Philips*, upon arguing exceptions before the late Lord Chancellor *Sommers*, and which had been ever since acquiesced in; and that the claims of all or most of the appellants were for wages due, or work done by them, or those they represent for the late Duke, and founded on letters or orders to his trustees to pay their debts; but respondents claims were for money lent, and mortgages to *Cherry* and *Browne*, made to secure the same: And further shewed, that appellants *Baker* and *Philips*'s debts were not liquidated or adjusted by the master, before *OHeber*, 1693, nor the rest till a considerable time after; and that other of the late Duke's creditors who had a priority of claim to appellants, had ever since the last order of the 28th *OHeber*, 1709, (though they before contested the same) acquiesced therein: And that if the appellants should succeed in their appeal, several of the declaration creditors of Mrs. *Browne* would be stripped of their just debts, Mrs. *Browne* dying insolvent.

George
Clive.

Die Veneris, 2^o *Martii*, 1710. After hearing council on this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the decrees, orders, reports and proceedings complained of affirmed. *Lords Journ.* vol. xix. p. 241.

The

The Right Honourable Francis } Appellant.
 Lord Conway, - - - }

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 1711.
 }

The most Noble John Duke of } Respondent.
 Buckingham and Normandy, - }

THE appellant stated: That *Edward*, late Earl of *Café 79*
Conway, was seized of lands in *England* and *Ire-*
land of 6500*l.* *per ann.* (the *Irish* estate 4700*l.* *per ann.*)
 designed to build a magnificent mansion-house at *Rag-*
ley, in *Warwickshire*, and in his life time built the
 stables and out offices, and laid the foundation of the
 capital house, and with great application carried it on
 one story high, and part of another, but died whilst
 it was carrying on in 1683; and by his will, 9th
August, 1683, devised all his lands in *England* and
Ireland to *Ursula* his Countess for life, subject to this
 trust: That out of the rents and profits of his estate
 in *Ireland*, his house at *Ragley* should be finished ac-
 cording to the model and design begun, and that so
 much should annually be allotted for the same as Sir
Edward Seymour, and Mr. *Gwyn*, should think neces-
 sary and convenient; and after his wife's death, and
 the decease of *Pepham Seymour*, appellant's brother,
 without issue male, all the lands were given to the ap-
 pellant for life, with divers remainders over: And that
 the Countess, in 1685, married the Duke of *Bucking-*
ham, and by articles, 12th *March*, in that year, Sir *Ed-*
ward Seymour and Mr. *Gwyn*, allotted 2000*l.* *per ann.*
 out of the rents and profits of the *Irish* estate, to be
 from thence forward allowed towards finishing the
 house according to the Earl's will, and the Duke co-
 venanted to allow the same accordingly; and that the
 Countess lived twelve years afterwards, and during
 that time 1700*l.* only was laid out in the building; and
 that since then it had greatly suffered by the Duke's car-
 rying it on in a slow manner, and different from the Earl's
 design, and that it would require a great sum still to
 finish it; and that in *May*, 1708, the Duke exhibited
 his bill in Chancery, and insisted he had finished the
 building, and prayed to be discharged from his cove-
 nant,

1711.

nant, and appellant in his answer insisted it was not finished, and brought his cross-bill to compel the Duke to perform his covenant; and issue being joined, both causes were heard before the late Lord Chancellor, 5th May, 1710, who declared that the words in the will *design*, and *model*, were synonymous, and meant one and the same thing; and directed certain issues to be tried at law, one of which was, whether at the time the key of the house was delivered or tendered, the building was finished according to the model left by the late Lord *Conway*, and if not, how much less in value the house then was for its not being so finished; and the Duke being dissatisfied, re-heard the causes before the present Lord-keeper, who was of opinion the issues directed were proper to be tried: And they were accordingly tried at the Common Pleas bar, and appellant gave evidence of several defects, and that the building was not suitably finished; and was proceeding to give evidence of what the Earl had declared his design and intention to be as to the manner of perfecting and finishing the said house, and to prove in what manner he had finished and ornamented the out-offices; but that the Duke's Council objected, that these defects were not described by the model, and that the Earl's design and intention was not the matter to be tried, but only whether the building were finished according to the model; and the Court being of opinion, they were tied down to the strict words of the issue, and that the appellant could give no evidence of any defects but what were described by the model, or a consequence of what was therein described; appellant chose rather to be nonsuit, and endeavoured by motion to have retracted the first issue, but it was objected, that the same being directed on the hearing, could not properly be altered upon a motion, and thereupon appellant petitioned to re-hear the cause, which was also dismissed, the Court not thinking fit to alter the issues; and appellant complained that by so confining the issue, he was not permitted to insist upon such things as were necessary, for finishing the house, unless such matters were described in the model; whereas he contended the words model and design, as the same were placed, and made use of in the late Earl's will, were words of description, and properly made use of to declare his meaning, how, and in what manner he designed and intended

intended the building should be finished; and that taking the whole clause, or sentence of the will together, (*viz.*) that the house at *Ragley* be finished according to that model and design which I began, and carried it on in: the words model and design were not to be taken as synonymous words, meaning one and the same thing, but were each of them significant and declarative of his intent and meaning, and neither of them to be rejected as superfluous, or insignificant, and might well import a reference to the model, as to the size and dimensions of the house, and to what was by him designed, as to the manner of perfecting and finishing the house; and further insisted, that what was so designed by the late Earl, was capable of being made out by proof, not only by the late Earl's declarations, but also in great measure by what he himself had done, touching the out offices and buildings, which he lived to finish suitable to his design: And that it could not be thought the testator meant only a reference to the model in wood, made before the building began, and much less, that he intended that only an outside, or shell of a house, should be built, and the house not finished or made fit for habitation. And appellant therefore hoped he should not be sent to law under any such restraint or prejudice, but that the issue should be so varied, or such other directions given, that he might have the full benefit of what was Edward meant and intended by the late Earl, according to his Northey will.

The respondent shewed upon his part, that he had carefully and diligently attended to the finishing the building, and employed the ablest workmen and artificers, and conducted himself by the advice of the most eminent council, and had expended 1072*l.* 12*s.* 8*d.* in finishing it according to the model; and that he had tendered the key to Lord Conway's agent, Sir *Edward Seymour* and Mr. *Gwyn*, who severally refused to receive it; and shewed further, that appellant lived at the old house just by for many years whilst the house was building, and frequently saw it, and made no complaints against it: And when the staircase was painting, which respondent was under no obligation to do, appellant chose the colour: And that in 1705 and 1706, a strict survey was made and

1711.

and compared with the model; and appellant and his lady, and Sir *Edward Seymour* and Mr. *Gwyn* were there, and then found no fault, other than with the garret floors, and desired some alterations might be made in the cornish, which was done accordingly; and that respondent, in 1709, exhibited his bill in Chancery, to be discharged from the trust, and to have up his articles; and appellant by his answer insisted upon many defects in the building and finishing the house, viz. That the house was too low, roof-ill placed and weak, want of cupulo and ballisters, timbers slight, &c. and exhibited his cross-bill for satisfaction of the pretended breach of trust, and damnifications: And that both causes were heard, the issue stated by appellant directed: And that appellant's own council and agents had drawn up the issues, and that appellant's council on the trial endeavoured to go off from the issue, and to examine witnesses as to what they imagined was designed by the late Earl to be done to the house: But the court being of opinion such evidence was unreasonable, and not material to the issue, appellant would not proceed farther, but became nonsuit; And that the Lord Keeper refused to alter the issue upon a re-hearing: And respondent insisted the Lords ought to affirm that order; because if the model should not be the rule of what was to be done, there could be no certainty, but fanciful imaginations of witnesses, or hearsay-evidence, must take place; and probably the buildings of this time, would be the rule for a house directed to be built 28 years ago: And respondent shewed, that many things were described in the inside of the model very particular, as dimensions of rooms, plans of doors and chimnies, pavement of the great hall, and pillars, and capitals, and freezes against the wall and cornishes, &c. which shewed what sort of finishing was meant; and insisted that in case a model were made of a house to be built, and a builder agree, no man could say the builder was obliged to do more than the model directed, unless upon a new agreement; and that the fashion and quality of wainscots, and other things contended for, was as endless as mens' fancies; and as to the floors, respondent shewed, that dawning floors, and streight and clean joints, were not so much as known, or in use when the model was made; nor were there any sash windows, or crown glais then in *England*.

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Die Jouis, 13^o Martii, 1711. After hearing council upon this appeal, and the question put thereon, it was ORDERED and ADJUDGED that the same should be dismissed, and the decrees, orders, and proceedings complained of affirmed. *Lords Journ.* vol. xix. p. 397.

Richard

1709.

Richard Gee, Esq. and Philippa his Wife, Executrix of John Beaumont, Esq. who was Colonel of the Regiment called the Princes Anne of Denmark,

Appellants.

Edward Lewis, Administrator of James Pearse the Younger, the Right Honourable Edward, Earl of Jersey, and the Right Honourable Barbara, Countess of Jersey, his Wife, Daughter, Heir, and Administratrix of William Chiffence, Esq. and William Blackway, Executor of Elizabeth Pearse, who was the Relict and Executrix of James Pearse the Elder,

Respondents.

Case 80.

THE appellants made this case: That Colonel *John Beaumont*, by articles, 12th February, 1688, appointed *James Pearse* the younger, agent to his appointment, who thereby covenanted to receive and pay the regiment's money, according to the Colonel's directions, and to keep his accounts clear and even; in consideration of his being allowed one man's pay out of every company, from the 1st of January, 1688; and that *William Chiffence*, Esq. and *James Pearse* his father, became bound to the Colonel for his due performance of the articles in a bond of 4000*l.* but that *Pearse* having misapplied the regiment's money, by advancing to several officers considerably more than their full pay, without the Colonel's directions, was turned out in August, 1689, and the Colonel put the bond in suit against his sureties, and exhibited a bill in the name of the Attorney General, to compel him to account in the *Exchequer*, according to the articles and the course of agency; and in his answer, he confessed 864*l.* 7*s.* 10*d.* received, and submitted to account accordingly: And 4th February, 1690, it was decreed that proceedings on the bond should be stayed, and that Mr. *Eden*, then Deputy Remembrancer, should state the accounts according

1709.

cording to the articles, and the course of agency; but that *Pearse* had only brought in a confused schedule of one hundred and forty general items, without any order of time or persons, amounting to 8163*l.* 7*s.* 7*d.* to discharge the said 8641*l.* 7*s.* 10*d.* and that thereupon the Colonel insisted that he should state the accounts for each company according to the articles, and the course of agency, which exclude all sums so over-paid to officers; and therefore *Pearse* declined the same, and died in 1695. And in *Trinity* term following Colonel *Beaumont* renewed proceedings on the bond, and obtained judgment; which was affirmed in the *Queen's Bench* in *Michaelmas* term, 1698, but was stayed from taking out execution, by cross suits in the *Exchequer*, and died in 1701, before he could reap any benefit by that judgment, leaving appellant *Philippa* his executrix; against whom respondents exhibited a bill in the *Exchequer*, to revive the former proceedings on the account, and to stay further proceedings at law: And, 22d *June*, 1704, it was referred to Mr. *Barker*, Deputy Remembrancer, to state the account according to the articles, and course of agency, and to allow such vouchers as had been proved, or admitted by Colonel *Beaumont*, before Mr. *Eden*; and that several witnesses had proved that the constant and known course of agency was to make the pay of every company, and the payments issued by the agent, balance with the establishment, and not exceed it to any officer without the Colonel's express direction; but that respondents relying upon the general items formerly brought in by *Pearse*, and transcribed in a paper, signed by Mr. *Eden*, demanded allowance for 8163*l.* 7*s.* 7*d.* and further insisted upon a new schedule of six other items, which were never pretended to by *Pearse*; and that Mr. *Stephens*, the new Deputy Remembrancer, by his report allowed the 8163*l.* 7*s.* 7*d.* and the six new items, amounting to 544*l.* 16*s.* 11*d.* to respondents, without stating any account in the course of agency, according to the directions of the decree: And that upon exceptions taken to this report by appellants, the Court, 10th *February*, 1708, confirmed it as to the 8163*l.* 7*s.* 7*d.* and directed an issue at law to try whether any part of the 544*l.* 16*s.* 11*d.* was included in the paper signed by Mr. *Eden*, the former Remembrancer; but refused to direct any issue to try whether

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whether the sums charged as paid the officers, were due to them, or not: And appellants stated the single question on this appeal to be, whether the Remembrancer had in this report pursued the last decree? and if not, whether respondents should not account with appellants in the course of agency? without which, they contended, it would be impossible to make the accounts clear and even, according to the plain words of the articles; and insisted it was evident upon the face of the report, that he had not so accounted; because, by the first decree, the Court directed the account to be stated according to the articles, and the course of agency; and the last decree, on which the report should be founded, directed respondents to account in the same manner: And further, because whatever payments were made to any officer above his full pay, were advanced by the agent at his own peril, (unless by the Colonel's directions); and it was utterly impossible to distinguish such over-payments, until the accounts for each company should be stated in the course of agency. And instanced Capt. Cooke's account, which by Mr. Pearse's answer and items in the schedules would stand thus:

Capt. Cooke and Company, Debtor.

	<i>l.</i>	<i>s.</i>	<i>d.</i>	<i>l.</i>	<i>s.</i>	<i>d.</i>
To subsistence, according to the establishment,	-	-	-	220	0	0
To more paid him on account of clearings,	47	9	4	131	0	8
To more on the same account, and advanced,	83	11	4			
To more advanced him, as pretended in one of the six items,	-	-	-			
				131	0	8

Charge,

482 11 4

per Contra,

Creditor.

By full heat pay for January and February, 88,
For March and April, - 89,

148 14 10

153 15 1

Overpaid, and therefore not to be charged to Appellants, -

302 9 11

179 11 5

482 1 4

And

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And so of several other sums in like manner, which appellants insisted ought to have been paid to other companies, whose clearings the Colonel was forced to pay out of his own pocket; so that if the accounts were duly taken, he would appear indebted to the Colonel above 1000*l*. And insisted further, that this report most apparently injured appellants; and that the notion on which it was founded, *viz.* That all payments made by the agent to the officers, whether due to them or not, should be a good discharge against the Colonel, was unreasonable; for so every steward might pay half his master's servants double their wages, and leave the other half unpaid, and yet make up a good account of his stewardship; and that if such a precedent should prevail, it would put the whole army William under the power of an agent, to pay them as unequally Ettric. as he pleased.

The respondents on the other hand shewed: That *Pearse*, the agent, had been turned out by Colonel *Beaumont* in *August*, 1619, without receiving any satisfaction for his wages: And that of the 8163*l*. 7*s*. 7*d*. proved by *Pearse*, the Colonel, only objected to four items, and at his request *Pearse* again produced his vouchers for those sums, and the Colonel was then satisfied, and Mr. *Eden* certified the same accordingly; and thereupon the Colonel, during *Pearse's* life, never proceeded further in the account, though *Pearse* lived till 25th *April*, 1695: And that the Earl of *Jersey*, who had given a bond of 3000*l*. penalty, in the place of *Chiffence*, who died, in *Hilary* term, 1702, in order to get up his bond, brought a bill in the *Exchequer* against *Phillippa* the Colonel's widow and executrix, since married to Mr. *Gee*; setting forth the proceedings afore said; and that after answer, that cause was heard, and an account directed as stated by appellant, with a special direction to allow such vouchers as had been proved or admitted by the Colonel before Mr. *Eden*, on taking the former account: And that the report stated by appellant was made, to which appellants filed exceptions, pretending the account was not taken according to the articles and decree, and course of agency; but by way of debtor and creditor. And that the several sums amounting to 544*l*. 16*s*. 11*d*. were a double charge; but upon consideration, the Court over-ruled the exceptions; and as to the pretended double charge, ordered

E c 2

ordered a trial at law, as shewed by appellants. And that on a re-hearing on appellant's petition, the Court affirmed the former order, which respondent insisted was just; because when the Colonel and officers, and agents were living, *Pearse* would have accounted regimentally, which the Colonel declined; having during *Pearse*'s short agency, received much more than his pay came to: And the Colonel, during *Pearse*'s life, and also during his own life, which was above eleven years, acquiesced in the account; but now, after all persons concerned were dead, appellants would have the method of accounting altered, and an account taken in the way the Colonel refused, which was impracticable; although the Colonel never pretended that there was a penny due to him nor had any officer or soldier of the regiment, ever complained that *Pearse* had not paid them their full dues.

Sam.
Dodd.
Law.
Carrier.

Die Martis, 20^o Decembris, 1709. After hearing council on this appeal, it was ADJUDGED by the Lords that the same should be dismissed, and the report of the Court of *Exchequer*, and orders therein complained of, affirmed; and that appellants should pay respondents the sum of 20*l.* for their costs. *Lords Journ. vol. xix. p. 24.*

Dame

1709.

Dame *Penelope Plunket*, Widow, - Appellant.

Tobias Lord Bishop of *Dromore*, Administrator of *Thomas Leigh*, and } Respondent.
also of *Charity Leigh* his Wife,

THE appellant stated: That *Moses Hill*, Esq. in Case 78. 1670, devised the manor of *Glynn*, and of the four towns of *Invarr*, in the county of *Antrim*, *Ireland*, to *Ann* his wife, and made her sole executrix and residuary legatee, and died without issue male, leaving two daughters, appellant, and *Rose Hill*, since deceased; the family estate having upon his marriage been charged with 400*l.* a year, for said *Anne's* jointure, and with 1000*l.* a-piece for daughters portions: And that on his death, *William Hill*, Esq. as next heir male, entered on all the real estate, including the lands of *Glynn*, insisting *Moses* had no power to dispose thereof; and that in a cause depending in the Court of *Chancery* in *Ireland*, wherein said *Anne Hill* was plaintiff, *William Hill* defendant, the Lord Chancellor assisted by Lord Chief Justice *Povey*, (the question being about the manor of the *Glynn*) 15th December, 1673, decreed, that *William Hill* should be quieted in the possession of those lands, declaring that the possession had gone with his ancestors for above 40 years, according to some old settlement, and ordered the tenants to pay their rents and arrears to said *William*: And, by a subsequent order, all the deeds and writings relating thereto were delivered to said *William Hill*; and the lands ever since enjoyed by his heirs male; and that in 1683, appellant married Sir *Walter Plunket*, at which time the 1000*l.* ought to have been paid, according to the settlement; and that *Anne Hill* made her will, and appellant her executrix and residuary legatee; and at her death, near 800*l.* was due for the arrears of her jointure: And that neither *William Hill*, during his life, nor *Michael Hill* his son, (to whom the estate descended) paid appellant these arrears, nor the 1000*l.* due on her marriage, or any interest: And that appellant was therefore driven to commence several suits in *England* and *Ireland*, which by the said *William* and *Michael*

1709.

Chae! Hill removing out of one kingdom into another, and their deaths, became fruitless: And that appellant being reduced to great extremity, was forced, 18th *December*, 1703, to come to an agreement with the mother and guardian of *Trevor Hill*, Esq. the heir male of the family, whereby in consideration of 100*l.* paid down, and 100*l.* a year for her life, she released the arrears due to her as executrix to her mother, the principal sum of 1000*l.* for her portion, and above twelve years interest, due for the same: And that the guardian insisting to have the lands of *Glynn* included in the release, and appellant conceiving herself barred by the decree against her mother, and never having heard of any debt owing by her father, consented to it for peace sake; but that, in *July*, 1705, respondent, as administrator of *Charity Leigh*, and administrator *de bonis non* of *Thomas Leigh*, in trust for and on the behalf of other persons only, exhibited his bill in Chancery in *Ireland*, against appellant, as executrix of her mother, executrix of *Moses Hill*, setting forth that in 1664, *Moses* borrowed 100*l.* from *Samuel Winter*, and together with said *Thomas Leigh* and *Richard Palfrey*, executed a bond of 200*l.* to pay this 100*l.* on the 17th *December*, 1665; and that *Leigh* in his life, *Charity*, his widow, after his death, and respondent since her death, paid *Winter* or his executors this 100*l.* and all interest due thereon: And that appellant had assets of *Moses Hill*'s, namely the 1000*l.* and 100*l.* annuity, and thereout prayed to be paid this debt and interest: And that appellant having answered, the cause was heard 19th *May*, 1708, and the Court, on the testimony of one witness only (who deposed to his belief only, that appellant would not have got within 400*l.* on the agreement, if she had not released *Glynn*) decreed a trial at law for the ascertaining what assets came to appellant either from her father or mother; that a trial was had 8th *February*, 1708; and the jury, on such evidence, found assets of *Moses Hill*'s came to appellant of the value of 400*l.* and 17th *February*, 1708, the cause was heard, and the Court confirmed the verdict, and ordered a master to inquire how much money *Thomas* and *Charity Leigh*, and respondent, had severally paid on account of the bond, and how much the whole, with interest from the respective payments, amounted to: And that the master reported only 170*l.* paid in money; but by computing interest

interest upon interest thereon, made the whole amount to above 500*l.* and that thereupon the Court ordered appellant to pay the 400*l.* as assets in her hands, by the first day of the then next *Michaelmas* term, without costs, if paid without further trouble, otherwise respondent to be at liberty to apply for his costs: And that after appellant had appealed to the Lords, and about five days before respondent could be served with the order to answer the appeal, the Court *ex parte* ordered costs against her; which decree, orders, and proceedings, appellant insisted were unjust, because no proof was made of any other assets besides the *Glynn* lands, and that but on the loose belief of a single witness; which appellant insisted was not a sufficient ground to direct such issue, appellant having in her answer sworn that she had no assets of her father's, and that the demands by her released over, and besides the *Glynn* lands, amounted to above 3000*l.* And further insisted that, and as to the *Glynn*s, no proof of those lands being assets, ought to have been regarded by the Court; for that by the decree in 1673, the rents and profits of those lands were decreed to *William Hill*, and ever since received by him and his heirs male: And further shewed, that appellant's mother lived thirteen years after the death of *Moses*, and was five years wife to the bishop of *Cloyne*, and no demand was ever made against her on account of this debt; And that from her death, to the time of the agreement in 1703, which was twenty years, no demand was ever against the appellant, nor had appellant any notice thereof: And appellant insisted that at all events the debt ought not to exceed 200*l.* the penalty of the bond (there being no *Sim. Har.* counter-bond to *Leigh*) especially as it was his own court. Ric. Turner, laches that the suit was not commenced sooner.

The respondent, in affirmance of that decree, shewed: That *Moses Hill* and *Thomas Leigh*, 17th *December*, 1664, had executed a counter-bond to *Palfrey*, in the penalty of 400*l.* which recited that *Palfrey*, at the request of *Moses*, and for his proper debt, had that day become bound together with the said *Moses* and *Thomas*, unto *Winter*, in an obligation of 200*l.* conditioned to pay 100*l.* and that *Moses Hill* was tenant for life to a considerable real estate, with remainder for default of issue male to *William Hill*, Esq. his brother, (under a settlement made the 28th *February*, 1658, by *Arthur Hill*, Esq.

1709. Esq.) and died in 1670, without issue male, having paid all interest then due, but no part of the principal: And by his will, devised all his leases in *Glynn*, and *Inuarr*, worth 230*l. per. ann.*, to his wife *Anne* during her widowhood, and then to appellant his daughter, and made his wife sole executrix, and residuary legatee: And that *Samuel Winter* died about 1678, leaving *William Shaw* his executor, who assigned this bond to the Bishop of *Killaloe*; and that after the death of *Moses*, *William* his brother entered on all the leasehold, and freehold estate, under colour of the settlement, and enjoyed till his death, in *October*, 1693, and then *Michael* his son entered and enjoyed till his death, in *November*, 1699, when *Anne*, his widow, in right of his son *Trevor Hill*, an infant, entered and enjoyed: And that *Anne*, the widow of *Moses*, concealed her husband's will till 29th *November*, 1682, to defraud his creditors, and the leasehold lands being possessed by the remainder men, under pretence of being freehold, (though in fact they were not) the creditors of *Moses Hill* were kept in the dark as to his assets: And that, 6th *May*, 1678, *Thomas Leigh*, who had no counter-bond from *Moses Hill*, paid to *Shaw*, *Winter's* executor, 70*l.* being all the interest then due upon the bond for seven years, at 10 *per cent.* and 48*l.* of the principal, in all 118*l.* so that 52*l.* of the principal then remained due: And that *Thomas Leigh* died, *August*, 1678, intestate, and *Charity* his wife administered to him, and died intestate, in *August*, 1681: And respondent took administration to *Charity*, and *de bonis non* to *Thomas*; and about the year 1681, was obliged to pay the bishop of *Killaloe* the remainder of the money due on the bond from *Moses Hill*, and took up that bond, and the counter-bond, to *Palfray*: And that *Anne*, the widow of *Moses*, in 1682, and not before, proved his will; and by her own will, 4th *July*, 1683, ordered that if appellant, her executrix, should recover the leasehold lands of *Glynn*, she should pay all the debts due to any person whatsoever from *Moses Hill*, and appellant proved her mother's will: And respondent, by reason of the troubles beginning in *Ireland*, in 1687, came to *England*, and continued there till 1691: and that *Anne*, executrix of *Moses*, and appellant, her executrix, always claimed these leasehold lands of *Glynn*, and the four towns of *Inuarr*, against *William*, *Michael*, *Anne* and *Trevor Hill*, and several suits were commenced, and

1709.

and several treaties set on foot, but never concluded, because appellant and her mother would not release their title and interest to the leases of *Glynn, &c.* but that appellant was at length prevailed on, and, in 1703, conveyed all her estate and interest in *Glynn*, and *Invarr*, to the said *Anne*, in trust for her son *Trevor Hill*; and in consideration thereof, and of all other her demands, received 1200*l.* in ready money, and an annuity of 100*l.* payable in *England* during her life; And that in 1705, respondent hearing of these chatrels real of *Moses Hill*, and having no remedy at law, preferred his bill in *Chancery* in *Ireland*, against appellant, and *Anne Hill*, and her son *Trevor*, praying a discovery of the assets of *Moses Hill*, and to be satisfied what *Thomas Leigh*, and respondent had paid upon the bond: And that appellant in her answer confessed the agreement with *Mrs. Hill*, but insisted that her mother or she had never been in possession of the *Glynn, &c.* or other leasehold estate; and that her own portion, and arrears of interest thereof, and of her mother's jointure, was much more than the consideration paid her by *Anne*, mother of *Trevor Hill*, so that though she released all her title and interest in these lands to *Trevor Hill*, yet these lands could not be deemed any assets in her hands: And respondent shewed that *Anne Hill* and her son *Trevor*, had in their answer confessed the agreement; and said that she would not have made it unless appellant had conveyed all her interest in *Glynn* and *Invarr*; and that several witnesses had proved that *Anne* would not have given appellant within 400*l.* of what she did, if appellant had not sold her estate and interest in *Glynn*, and in the mesne profits thereof: And that the Chancellor on the hearing, 19th *May*, 1708, declared the debt was a good debt, and well proved; but that it would be hard to charge defendant with assets, when it did not plainly appear they came to her hands, but declared that assets in equity were assets at law; and therefore ordered that plaintiff should bring his action at law against appellant, and that she should plead *plene administravit*; and that a trial should be upon this issue, whether defendant had any, and what assets of *Moses* or *Anne Hill*'s, in her hands unadministered: And that after several delays a trial was had at the bar of the *Queen's-Bench*; and the verdict was that defendant had assets in of *Moses Hill* unadministered, to the value

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Thomas
Powis.
Spencer
Cowper.

value of 400*l.* sterling: And thereupon the decree complained of was made, and the further decree on the the master's report; which order and decree, respondent insisted was in every respect according to the rules of law and equity, just and reasonable, and that the appeal ought to be dismissed with exemplary costs.

Die Veneris, 17^o Februarii, 1709. After hearing council on this appeal, the Lords ANJUGEN that the same should be dismissed, and the order and decree complained of affirmed. *Lords Journ.* vol. xix. p. 71.

James

James Greenshields, Clerk, = Appellant.

1710.

The Lord Provost, and Magistrates } Respondents.
of Edinburgh,

THE appellant made this case: That he was born near *Edinburgh*, and educated in that university, and, in 1694, duly ordained a Presbyter by the Lord Bishop of *Ross*; and went into *Ireland*, where his orders were allowed, and he admitted, first by the Bishop of *Down*, to a curacy in his diocesis; and afterwards by the Primate to the curacy of *Tynan*, in *Armagh*, which he served twelve years with a clear reputation, as appeared by divers certificates; and in 1709, returned to his native country about his private affairs; and his rector of *Tynan* dying soon after, became destitute of a livelihood for himself, a wife and seven children; and at the desire of some of her Majesty's English servants at *Edinburgh*, exercised his ministerial function in a private house at *Edinburgh*, by reading the liturgy and preaching, as was lawful for him to do, always praying for the Queen, and the Princess *Sophia*: And that the Presbytery of *Edinburgh*, nevertheless, called him before them for presuming to exercise his function in their bounds, without their allowance; and notwithstanding his orders, certificates, and testimonials, of his good affection to her majesty's person and government the Presbytery, nevertheless, prohibited and discharged him from exercising the ministry there, grounding their prohibition upon his exercising the ministry within their bounds, and without their allowance, and introducing a form of worship contrary to the purity and uniformity of the worship of the church established there by law; and recommended it to the magistrates of *Edinburgh* to render their prohibition more effectual: And that thereupon the magistrates summoned appellant before them, requiring his obedience to that sentence, with threats of imprisonment in case of non compliance; but that appellant believing it to be his duty, and consistent with the laws of that kingdom, to exercise his function in the private manner he had done, continued his ministry as before; for which the magistrates, 15th September, 1709,

1710.

1709, committed him prisoner to the common goal, there to remain until he should give security to desist from the exercise of the ministry within their bounds, or to remove himself thence: And that appellant, in November following, preferred a bill of suspension of that sentence to the Lords of the Counsel and Session, to which the magistrates put in their answer, and insisted upon a matter not contained in, but foreign to the sentence, viz. that appellant having received ordination from the exalted bishop of *Ross*, after the abolition of episcopacy in *Scotland*, was not a minister duly qualified, and therefore the Lords of the session refused to deliver him from the prison, where he lay under confinement above seven months: Which sentence and decree, appellant insisted were illegal and unjust; because, though Presbytery were the legal established church government in *Scotland*, yet there was there no law of conformity, which obliged the laity to be of their communion, nor any law which prohibited the ministers of the communion of the church of *England* to exercise their function, or the laity to join in worship with them in a private manner, or which gave the magistracy any jurisdiction to inflict penalties on such ministers or laity: And those acts of parliament whereon the sentences were pretended to be founded (and particularly the act against intrusion into churches, made in the year 1695,) were never intended against a person in appellant's circumstances; for that act was made only against those who intrude into vacant churches without a legal call and admission; and that appellant never intruded into any church or benefice, or deprived any person of his right, but exercised his function only in a private house to those of the same communion with himself; neither was imprisonment warranted by any of the said acts: And further, because the Lords of Council and Session ought only to have affirmed or reversed the sentence, for the reason on which it was founded, and not proceed to judgment upon any new reason: And finally because if those Lords might found their decree upon a new reason, not contained in the magistrates sentence, yet their decree, as to such new reason, was contrary to the principles and practice, not only of the christian church in general but of the church of *Scotland*, which admitted Presbyters ordained by excommunicated Presbyters, and also Presbyters in the same circumstances with appellant, who

who, though they were ordained since the abolition of episcopacy by excommunicated bishops, yet their ordination had been allowed of, and they admitted to the cure of souls, as rightly ordained; wherefore, and because there was no superior court of justice in *North-Britain*, whereto he could in this case have any recourse, appellant prayed that decree might be reversed.

The respondents on their part stated, that appellant, without any lawful warrant, set up a meeting-house in *Edinburgh*, for preaching and public worship, contrary to the method and usage of the church of *Scotland*, in an insulting and offensive manner, just opposite to the great church of *Edinburgh*, where four parishes meet for public worship; and the Presbytry of *Edinburgh* summoned him before them, for so presuming to exercise the ministry; and that appellant appeared, and produced the certificate of his ordination, by the excommunicat Bishop of *Resis*, with some testimonials from *Ireland*; but declined the authority both of the Presbytry and national church, and subscribed the same *coram*, and insisted that the church had no jurisdiction over him as to spiritual concerns; and adhered to his declinator; whereupon the Presbytry prohibited him, and recommended it to the magistrates of *Edinburgh*, to render the sentence effectual according to law: And thereupon, and upon a petition signed by many hundreds of the neighbourhood, the Lord Provost, and other magistrates of *Edinburgh*, cited appellant to appear before them, and required him to obey the act of Presbytry; which he refusing, they again prohibited him to exercise any part of his ministry within *Edinburgh*; and gave him notice, that upon his first transgression that they would imprison him according to law; but appellant, notwithstanding, preached and performed divine service the Lord's day following; whereupon the magistrates committed him to the prison of the *Tolbooth*, there to remain until he should find sureties to obey the sentence, or remove out of their bounds; and that appellant preferred a bill of suspension to the Lords of Session, who after a new and full hearing, again refused him; whereupon appellant protested against the Lords of session, and appealed to the Queen's Majesty, and the Lords; and that the Lords having declared by their order, that the prosecutors should be

at

1710.

liberty to argue in the first place, whether this appeal be regularly and properly before them or not, respondents contended it was not, because the Presbytry was only a subordinate ecclesiastic judicatory, from which appeals in course lie to the superior judicatories of the provincial synod, and general assembly; and if appellant thought himself grieved by the sentence of the Presbytry, and omitted this known and proper remedy, he could not in law, or good order, appeal from the Presbytry to the Lords, who in all appealable cases are known to be judges only in the last resort: And if this appeal be from the sentence of the Presbytry to the Lords, no proper defenders or contraditors were summoned or called, and the Presbytry's sentence could not be reviewed, unless they themselves were called to answer for it, and that the respondents were not the persons to make answer in the case: And that although appellant pretended only to appeal from the decree of the Lords of Session, and the sentence of the magistrates, he directly libelled the sentence of the Presbytry, as groundless and illegal, and therefore to be reviewed; which upon the matter, was an appeal from the Presbytry against it; and that the sentence of the magistrates was purely executive; and that they were only concerned to make the sentence of the Presbytry effectual, as they were obliged to do by law, (particularly by the act of parliament, 1693, for settling the quiet and peace of the church; whereby it was expressly enacted, that all magistrates, judges, and officers of justice, give all due assistance, for making the censures of the church and judicatories thereof to be obeyed, without inquiring into the reasons of that sentence, which was wholly *alterius fori*, and not liable to their cognition: And therefore the magistrates could not be questioned for what they did in obedience to the law, unless they had exceeded their authority in the execution, which it was not pretended by appellant they had done: And if the magistrates had exceeded in the execution, appellant had the obvious remedy to complain to the Lords of Session, by a bill of suspension; but the Lords of Session did twice refuse his bill, as there was no reason for granting it: And no appeal could be made from the execution of any sentence, unless first made against the sentence itself; and since this was the sentence of an ecclesiastic court, in a matter only under the cognition of the church, and to be remedied (if amiss) by its superior judicatories,

judicatories, the appeal ought to be adjudged unlawfully made; for that even in the Church of *England*, there are writs issued out in course, for executing ecclesiastic sentences, as the writ *de Excommunicato Capiendo*, which though a civil writ, yet being a writ of execution of an ecclesiastic sentence, unless the sentence be first reviewed by an ecclesiastic judicatory, there lies no appeal against the writ, as being purely executive: And that before the late union of the two nations, it was never known that any appeal from the ecclesiastic judicatory of the church, lay properly or regularly to the parliament of *Scotland*; nor could any precedent be produced of such an appeal brought; and for full justification of both the Presbytry's and their own proceedings in this case against the appellant, respondents relied on the following laws: 1. The third act of King *William* and Queen *Mary*, 1689, entitled, an act abolishing prelacy. 2. The fifth act of the same parliament, 1690, entitled, an act, ratifying the confession of faith, and settling Presbyterian church government. 3. The twenty-third act of the same parliament, entitled, an act for settling the peace and quiet of the church. 4. The sixth act of the fourth session of King *William* and Queen *Mary*'s first parliament, entitled, an act for taking the oath of allegiance and assurance. And on the following proclamation of the 21st of *March*, 1706, entitled, an act and proclamation against intruders into churches, (amongst other things). "The Queen and the Lords of her majesty's privy-council did thereby prohibit and discharge all persons who have no authority from within the church of *Scotland*, but pretend to a warrant or licence from the late exauctorated bishops, since they were exauctorated, to exercise any part of the ministerial function, within this church, or any kirk or parish thereof, upon pain of being seized and secured by the magistrates of the bounds, in order to their trial, pursuant to the act of parliament of 1693, and the magistrates are thereby required to seize and secure such persons, and punish them according to law.

Peter
King.

Die Lune, 13^o *Februarii*, 1709, This petition of appeal presented to the Lords, and then ordered, that on Thursday next the house should take into consideration, whether the petition should be read, and that all the Judges should then attend the house, and all the Lords summoned, *Lords Journ.* vol. xix. p. 64. and *Yevir.* 16^o

16^o *Februarii*, the petition read, and ordered, that before the petition be received, authentic transcripts of all the orders and proceedings against *Greenshields*, touching the matter complained of, be laid before the house. *Id.* *Journ.* p. 68. Delivered in *Veneris*, 17^o *Martii*, p. 111, and ordered to be considered, when Doctor *Sacheverel's* impeachment over. *Veneris*, 24^o *Martii*, the orders and proceedings being laid before the house, ordered that the house will to-morrow take into consideration whether the petition shall be received, and all the Lords summoned to attend, p. 125. And *Sabbati*, 25^o *Martii*, 1710, after reading the extracts and transcripts of the orders and proceedings delivered, it was ordered by the Lords, that the petition and appeal be received, and that respondents answer before the first day of next session of parliament, and that their council be at liberty to argue in the first place, whether this appeal be regularly and properly before this house or not, p. 127. And,

Die Jovis, 1^o *Martii*, 1710 after hearing council to that point, it was resolved, that the petition and appeal is regularly and properly before the house: And,

After hearing council on the petition and appeal, it was ORDERED and ADJUDGED that the sentence of the magistrates of *Edinburgh*, and the decree of the Lords of Session, in *North Britain*, made against the said *James Greenshields*, be reversed. *Id.* *Journ.* p. 240.

Sir

Sir Streyusbam Master, Kt. - - Appellant.

Frances Cook, Widow, and John } Respondents.
Ward, Esq. - - -

1712.

THE appellant made this case: That *George Cafe* 80.
Middleton Oldfield, mortgaged the manor of
Somerford in *Cheshire*, and other lands in *Lancashire*
and *Westmoreland* to the respondent *Cook*, for about
11,500*l.* and died, in *January*, 170³, and the equity
of redemption descended to his two sisters and heirs;
and respondent *Cook* wanting her money, and the coheirs
not being prepared to pay it, was forced to become
purchaser of *Somerford* for 8000*l.* or thereabouts,
and discounted so much out of the mortgage debt;
and the other respondent *Ward*, a barrister at law, who
transacted *Cook*'s business, promised her to sell *Somerford*,
and pay her 8000*l.* in a short time, and accordingly
treated with appellant, and offered it to him at 9000*l.*
and affirmed it was worth more, but that he designed
appellant a favour on account of some family obli-
gations; and in that confidence appellant agreed to
purchase at 9000*l.* and the agreement was about
8th of *June*, 1710, at *Ward*'s importunity, re-
duced to writing to this purport, viz. "That ap-
pellant should pay *Cook* for the purchase of the
" *Cheshire* estate, late *Oldfield*'s, 9000*l.* with interest,
" from *December*, 1709, at 5*l.* per cent. at several
" days therein mentioned; that *Cook* should make a good
" title, to the liking of Mr. *Webb*, (a conveyancer)
" and on payment of the money, make reasonable con-
" veyances." And this agreement was signed by ap-
pellant and *Ward*, in presence of *Ward*'s scriviner, who
had written it: And that since the agreement, and not
before, appellant was apprized of the claim of one
Davenport, a pauper, who had filed his bill in *Chan-
cery*, unknown to appellant, to be decreed to part of
Somerford; and that the writings touching the title
of *Somerford*, were laid before *Webb*, who was not
satisfied with the title; and respondents, in *Hilary*
term, 1710, filed their bill in the *Exchequer*, to com-
pel a specifick performance of the agreement, alledg-
ing that they had obtained a release from *Daven-
port*

F f

port to *Ward*, and his heirs; and that appellant in his answer, insisted that a title should have been made out to *Webb's* approbation before the respondents were proper for relief against him, and that the Court ought not to compel him to purchase, as *Ward* had elapsed his time for making out the title: And on the hearing, 4th *June*, 1711, appellant's council objected, that it did not appear that *Ward* had any authority from *Cook* to treat with appellant about the purchase, and that therefore the agreement was void by the Stat. of frauds §. 4. and respondents council not being prepared to answer the objection, or to make out the title, the Court indulged them with time, and returned the cause 28th *June*, when, respondents not being yet ready, were ordered to pay costs to appellant, and had a further day; and 6th *December*, the cause came on again, when a note was produced, pretended to be under *Webb's* hand (but not proved, nor mentioning in what cause, or between what parties) dated 14th *November* before, which signified his liking of the title, so as to recommend it only to a willing purchaser, which appellant insisted he could not be termed, and at the same time was first produced by way of exhibit, an agreement between *Cook* and *Ward*, dated 7th *June*, 1710, the day before the agreement between appellant and *Ward*, which was said to be agreeable to the allegation of the bill, and equivalent to an authority in writing, though in fact it did not agree therewith, and seemed to import money paid by *Ward* to *Cook*, and that *Cook* was to have more from him afterwards, and then *Ward* to have the benefit of the purchase from *Cook's* trustees; and so the council urged that *Ward* was by *Cook* authorized to treat with appellant, which appellant insisted could not be, because only an equitable, not legal interest, was vested in *Ward* at the most, and that on condition that he paid money to *Cook*, which was not yet paid; besides, the estate at law was neither in *Ward* nor *Cook*; but in *Cook's* trustees, as appeared upon the face of the last agreement; which was privately made between the respondents, of which appellant had not the least notice, and therefore could not have equal remedy against *Ward*, allowing it had been a good authority; nor had appellant any opportunity to examine to the time when the said agreement was executed, which he insisted he ought to have had, and the rather, because it was never produced before; notwithstanding

{ 1712. }

notwithstanding which objections a specifick performance of the first agreement was decreed against the appellant, without costs on either side; whereby appellant complained he was aggrieved, because he was ready and willing to have paid the purchase money, had the title been made out to *Webb's* satisfaction in due time, which was not for near twelve months after respondents bill filed: And further, because if 8000*l.* to *Cook* was a valuable consideration for the estate, 9000*l.* to be paid by the appellant was an imposition upon him: And again, because the release from *Davenport* was not effectual, being made to *Ward*, who had no freehold, in deed, or in law, nor any reversion at the time of the release, and therefore the release could neither transmit, nor extinguish, *Davenport's* right, but his estate still remained in him: And further because respondents had not by their bill set forth any sufficient authority in *Ward* from Mrs. *Cooke*, to make or sign the agreement within the statute of frauds; nor indeed had *Cook* any legal interest in the estate, so as to authorize respondent *Ward* to treat, nor had he any sufficient authority from Mrs. *Cooke* for the making the agreement, whereby appellant could compel her to perform it: And finally, because if any opinion, as to the title, had been given by *Webb*, (which was not proved in the cause,) the same did not import his liking the title, but only that a willing purchaser might run the venture of it, which appellant did not think it reasonable to do in so great a value.

William
Turner.
Henry
Arden.

Respondents shewed that on, *Oldfield's* death, *Ward*, in order to help Mrs. *Cook* to part of her debt, which then amounted to 11,400*l.* besides interest, did, in her name, but upon his own account, about a year after, agree with the co-heirs of *Oldfield*, for the purchase of the *Cheshire* estate: And that, 7th and 8th *December*, 1709, the co-heirs and trustees of *Oldfield*, by respondents direction, conveyed the *Cheshire* estate, in satisfaction of the interest then arrear, and of 8400*l.* of the principal money, to *George Hofer* and *William Constantine*, Esqrs. and their heirs: And that there was a memorandum in writing signed by both respondents, dated 7th *June*, 1710, reciting the purchase, and that it was intended in trust for *Ward*; he paying as well the arrears of interest, as the principal sum of 8400*l.* with the growing interest, from

from 8th December, 1709; and accordingly *Cook* acknowledging the arrears of interest to be then paid by *Ward*, agreed that that upon payment of 8400*l.* and interest, she and the trustees would execute conveyances, and *Ward* agreed to pay the same at or before *Christmas* after: And that appellant having, as he confessed by his answer, treated with *Oldfield* in his lifetime, and bid above 9000*l.* for this *Cheshire* estate; and respondent *Ward* apprehending it might be acceptable about *May*, 1710, offered it to appellant at 9000*l.* which he readily accepted, and the writings of the title were sent to *Webb*, to peruse for appellant, and a memorandum of the agreement was set down in writing by Mr. *Jacob* a scrivener, and friend of appellant, dated 8th *June*, 1710, viz. appellant to pay 2000*l.* at midsummer, with all interest then due, and the remaining 7000*l.* with interest, at *Christmas* after, that appellant should have the rent due at *Lady-day* then past, and the advantage of all lives fallen, allowing taxes, steward's salary, and other deductions usual, and that Mrs. *Cook* should make a good title to the liking of Mr. *Webb*, and upon payment should at appellant's charge, make reasonable conveyances; and each party had a duplicate signed interchangeably of this agreement: And that for avoiding all cavil upon account of one *John Davenport* a pauper, who pretended some claim to a small part of the estate, and had brought a bill in *Chancery* against *Cook*, and the co-heirs of *Oldfield*, though in truth he had no right, respondent *Ward* agreed with him for his demand, and he dismissed his bill, and by indenture of that date released all his right, and that this deed was left with the other writings at Mr. *Webb*'s chambers, in two or three days after the date: And that this claim of *Davenport*'s was appellant's only objection to the title; and respondents insisted the decree of the *Exchequer* ought, under these circumstances, to be affirmed.

I. Jekyll.
Sam.
Dodd.

Die Martis, 13^o *Maii*, 1712. After hearing council on this appeal it was ADJUDGED that the same should be dismissed, and the decretal order complained of affirmed. *Lords Journ.* vol. xix. p. 446.

Jonathan

1713.

Jonathan Shere, Gent. - - - Appellant.

Joseph Cock, - - - Respondent.

THE appellant made this case: That respondent, *David Codd*, *William Wogan*, and appellant, 7th of *December*, 1705; became jointly bound to *George Robinson*, Esq. in a bond of 400*l.* penalty, to pay 200*l.* and interest, on the 8th *March*, then next, and that this was for the proper debt of the other three, who divided the money between them, appellant having had no part; and then respondent, *Codd*, and *Wogan*, gave appellant a counter-bond in 800*l.* and *Robinson*, about *Trinity* term, 1706, put his bond in suit against the four obligors, in several actions; and they employed appellant as their attorney and solicitor, to bring a bill in *Chancery*, to be relieved against the penalty of that bond; and appellant therein laid out considerable sums, and was greatly dammified thereby, and by the action brought against himself; and his co-obligors refusing to reimburse him, he, about *Hilary* term, 1708, put his counter-bond in suit against respondent only, who moved the court of *Common-Pleas* to have appellant's bills taxed, and brought *Codd* with him to consent, by rule of court, to pay what the Prothonotary should tax due to him; but respondent, or *Codd*, not proceeding upon that rule, appellant obtained liberty to proceed in his action; and thereupon respondent, upon a bill in *Chancery*, for relief against the counter-bond, obtained an injunction to stay appellant's proceedings at law: And that appellant in his answer denied the pretended equity thereof, and annexed a bill of his disbursements and other demands, and submitted to have it taxed, and to deliver up the counter-bond, on payment of the sum to be taxed; and then exhibited a cross-bill against respondent and the other obligors, for discovery of his retainers; and *Feb.* 14th, 1710, obtained an order to stop in the original cause, till defendants should have answered the said bill, and then both causes to be heard together, and thereby publication was stayed in the original cause, according to the constant practice of the Court: But, 28th *June*, 1711, respondent moved to discharge that order, and it was

1713.

was then ordered by the Lord Chancellor, (*Harcourt*) then Lord-Keeper, that respondent's clerk should give appellant a note in writing, where the other defendants lived, and appellant to proceed against them; which note never was given: Yet, 20th of *July*, 1711, respondent obtained an order, whereby the order of the 14th of *Feb.* was discharged, and appellant deprived of the benefit of the other defendant's answer to his crossbill, and also of the benefit of examining his witnesses: And that whilst the cause stood in the paper for hearing, respondent's clerk (without any order to transfer it) set down the cause to be heard as an original cause; and in *Michaelmas* term, 1711, brought it on without any notice to appellant or his clerk, and so it was heard *ex parte*, and a decree obtained against appellant, as by default: That *Robinson* should, at respondent's charge, acknowledge satisfaction on record of the judgment obtained by him against respondent, and respondent to pay him 40*s.* for his costs; and that appellant should pay respondent all costs which he had been put to at law by *Robinson's* suit against him, together with what costs respondent paid in that suit; and if respondent was then liable to pay any costs therein, it was further decreed that appellant should indemnify respondent against them, and also should pay any costs respondent had been put to by reason of appellant's putting his counter-bond in suit, together with such costs as respondent should pay *Robinson*, and likewise respondent's own costs in this suit; and that appellant should deliver up his counter-bond to be cancelled, and a perpetual injunction against the same; and in appellant's default therein, that *Codd* should pay these costs to respondent, and be at liberty to make use of respondent's name, to recover over against appellant unless cause by the return of a subpoena; and that appellant shewed cause against the decree, 7th *May*, 1712, and insisted on the irregularity of the proceedings, which was referred to Mr. *Rogers*, who, 14th *May*, certified that the proceedings were irregular; but that to this report respondent took exceptions; and 30th of *July*, 1712, the report was discharged, and the decree made absolute; which proceedings and decree, appellant insisted were erroneous and unjust; because, by order of the 20th *July*, 1711, the order of the 14th of *Feb.* was discharged, and appellant deprived of examining his witnesses, and respondent's cause heard, *ex parte*, as against appellant; and both causes ought to have been heard together,

together, and publication to have been stayed until defendants had answered appellant's cross-bill: And further insisted that the master's report ought not to have been discharged, and that the decree ought to have been set aside as irregularly obtained; and that the decree was itself unjust; because appellant ought not to pay respondent any costs, nor indemnify him against any, on account of the counter-bond or otherwise; and that the counter-bond ought not to have been decreed to be delivered up, nor any injunction awarded against it.

The respondent stated that appellant, an attorney at law, by the means of *David Codd*, procured 150*l.* to be lent by *Robinson*, Esq. to respondent, and 50*l.* to *Codd*; and that the bond and counter-bond stated by appellant were entered into; and that in *April* following respondent, who had no acquaintance with appellant, paid *Codd* 150*l.* with interest, being his share of the money borrowed before any suit commenced, and *Codd* undertook to see the bond discharged, but did not; and *Robinson* took out a writ against respondent *Codd* and appellant, who acted only as *Codd*'s attorney; and *Codd*, and appellant, without respondent's knowledge, gave bond to the sheriff for respondent's appearance to the writ, and appellant took upon him to appear as attorney for respondent to the action in the *Common Pleas*, without respondent's privity, and received a declaration against respondent in that action, and suffered judgment to be entered against him, and afterwards brought a writ of error in respondent's name, and procured bail thereon, and appeared to a *Sic fac* to assign errors, and the judgment was affirmed without the least knowledge of respondent; and afterwards exhibited a bill in *Chancery*, without respondent's knowledge in the name of himself, respondent and *Wogan*, against *Robinson*; in which suit *Robinson* served respondent with a subpoena for 40*l.* costs of over-ruling exceptions to his answer, which was the first notice respondent ever had of any of these proceedings; and that the principal equity sought by that bill, was for appellant to set off a debt he claimed of *Robinson* for law charges against the bond; and that this bill was dismissed with costs, which *Robinson* compelled appellant to pay, the bill being framed solely for appellant's own benefit; and then *Robinson* proceeded on the judgment against respondent and *Codd*, and recovered the 200*l.* with interest and costs at law, and levied

1713.

vied the same on *Codd*; but appellant did not pay any part, nor was appellant in any manner damified by the said bond, notwithstanding which appellant brought an action against respondent on his counter-bond 800/. and extorted 20*l.* from him on pretence of damage; and the condition of the counter-bond being to pay at the day in the original bond, respondent could not at law-plead payment, though the money had been really paid; and therefore exhibited a bill as stated by appellant; and all the defendants having answered, rules were given for publication in *Trinity* term, 1710; and after publication twice respited on respondent's petition, appellant moved to respite publication further to the first day of the then next term, which was granted on terms, that respondent should be at liberty to set down his cause the same term, and appellant to appear gratis, on six days notice to his clerk in Court, and pray no day over; and publication was afterwards twice respited till the second general seal after that term; and in *Hilary*, 1710, pursuant to the former order, the cause was set down for the 1st of *Feb.* 1710, and notice in writing given to appellant's clerk; but to prevent the hearing, appellant, in that term, filed a bill against respondent, *Robinson* and *Codd*; and by petition, suppressing the proceedings in the original cause, obtained the order that proceedings in the original cause should stay till defendants should answer appellant's bill, and then both causes to be heard together, which order wholly stopped respondent's cause; for though respondent answered appellant's bill, yet the other defendants not answering, the cause could not proceed, for appellant never served *Robinson* or *Codd* with a subpoena to answer his bill, and by this artifice appellant always meant to delay respondent, for he never proceeded in his cause but by an order 1st *August*, 1782, his cross-bill was dismissed; and the Lord Chancellor, on a full hearing of council on both sides, discharged the order of 14th of *February*; and on respondent's special application, his cause was set down to be heard, and a subpoena served on appellant to hear judgment; and 14th *November*, 1711, the decree complained of was made on appellant's default, and that appellant obtained an order to refer the regularity of setting down the cause, and obtained a report as shewed by him, but that on respondent's exceptions it appeared, that not only appellant was served with a subpoena to hear judgment, but also that

that his two clerks in court had notice that the cause was in that day's paper, and neither of his clerks had denied it, though appellant himself had made a bold affidavit; and therefore the Chancellor allowed respondent's exceptions, and afterwards made the decree absolute; which respondent submitted was a just decree, and ought not to be reversed.

Die Veneris, 19^o Junii, 1713. After hearing council upon this appeal, it was ADJUDGED that the same should be dismissed, and the decree and proceedings complained of affirmed; and that appellant should pay respondent forty pounds for his costs. *Lords Journ.* vol. xix. p. 580.

1713.

R. Raymond.
mond.

S. Mead.

Thomas

1713.

Thomas Pillans,

Appellant.

John Harkness,

Respondent.

Case 82.

APPELLANT made this case: *Walter Stuart, Cornelius Denn*, appellant, and respondent, by deed, 30th *April*, 1709, agreed to be partners for nine years, in the trade of catching and curing of fish in and about the islands of *Boat, Aran* and *Kiniire*, on the western coasts of *North Britain*, or such other coasts or places as any three of the partners should think fit, and to deposit 2400*l.* joint stock, and to increase it occasionally; appellant was appointed to be sole manager in *North Britain*, and reside there at a salary of 200*l.* and to keep books and transmit copies yearly to *Stewart* and *Denn*, who were appointed managers in *London*; all parties to be equally concerned in profit and loss, and accounts to be balanced yearly in *London*; and after the deed executed, respondent and *Denn* proposed to erect another fishery, between the *Fyfe* point and *New-Castle*, including the *Fyrb* of *Forth*, under the covenants in the said deed, and to add 1000*l.* more to the joint stock, appellant to be sole manager, and have 50*l.* per annum additional more, which was agreed to, and a declaration thereof executed by all the parties 5th *May*, 1709; and 17th of that month appellant arrived at *Edinburgh*, and went forthwith to the western coasts, and with great expedition provided fishermen, boats, cellars, casks, salt, and all other materials necessary at *Boat, Greenock*, and other parts, and began to fish the latter end of *June*, and some of the men and boats continued fishing till *March* or *April* following, and bought a large boat, and hired a *marque* at 9*l.* a month, which he sent to the western *isles*, with money and all necessities to catch and buy fish; and caught and bought several quantities of cod and herrings, which were afterwards sent to foreign markets, and sent an account of all his transactions, with invoices, &c. to the partners in *London*, and received their answers from time to time, acknowledging the receipt thereof; and in *July*, 1709, appellant, by orders from the partners at *London*, met *Stewart* at *Edinburgh*, who told appellant, respondent and *Denn* were resolved to erect a fishery on the north coast of *North Britain*, and left every

1713.

every thing to his management, and then produced and read a letter signed by them, dated at *London*, July 23d, to that purport. Appellant and *Stewart* accordingly entered into measures for erecting such fishery, but finding it hazardous and difficult, unless some gentlemen residing in *North Britain* were likewise concerned therein, agreed to take in partners for one moiety of the new undertaking, and keep the other for the joint use and benefit of the old partnership, and accordingly executed an agreement, dated *Sept. 21st*, 1709, between *Stewart* and appellant, of the one part, and *James Gordon*, *James Moodie*, *John Sinclair* of *Barrack*, *John Sinclair* of *Lybster*, *Patrick Dunbar*, and *John Innes*, of the other part, to trade jointly in buying, selling, catching and packing of fish on the coasts of *Gaithne/s* and *Strathnaver*, and fresh rivers adjacent; and *Stewart* and appellant to advance half the money necessary, and the other partners the other half; and appellant received a letter dated 9th *October*, 1709, at *London*, subscribed by *Stewart*, *Denn*, and respondent, acknowledging *Stewart's* return to *London*, and acquainting them with the new agreement, and directing appellant how to proceed as to the fishing on the coasts of *Fife* and *East Lothian*; and appellant received several other letters subscribed as above, ordering a copy of the agreement to be sent them, and afterwards acknowledging the receipt thereof, and assuring appellant no money should be wanting on their parts to carry the new undertaking to perfection; and the fishery on the west not answering expectation, sent directions to bring in that stock to the other undertaking, and gave particular directions how to apply and dispose of it; and respondent himself, by a letter dated at *St. Ives*, 7th *January*, 1709, wished appellant a good journey into the North, and *Inter a'ia*, mentioned that *Denn* promised to pay *Stewart* 300*l.* at *Christmas*, and *if he will not pay we must drop him*: And appellant being still encouraged by letters, and never hearing of any divisions or controversies between the partners in *London*, went on in managing the fishery (in conjunction with *James Gordon* and the other new partners) on their and his own part, and from time to time transmitted them accounts of his management in catching, buying, and curing great quantities of salmon, cod and herrings, and sending them to foreign markets, with the names of the ships, and to whom consigned, not doubting but the several letters so sent to him were a sufficient confirmation.

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 firmation of the agreement made in *Scotland*; and the fishing season being almost over, appellant, 30th *March*, 1710, made up a general account relating to the fishery on the western coasts, and sent it to respondent, *Stewart*, and *Denn*, and had before that time paid, expended, and ought to be allowed on that fishery 1897*l.* besides 800*l.* paid by him towards the fishery on the north coast, and in *February* 1711, came to *London*, and brought the accounts of the western fishery, and also an account of his payments, &c. to the northern fishery with him, whereby it appeared he had disbursed, on account of both fisheries, above 6000*l.* besides his salary and commission, and that there was a great loss; and that respondent, 5th *October*, 1711, (and never before) declared his dislike, and that he would not be further concerned therein, and exhibited his bill in *Chancery* against *Stewart*, *Denn*, and appellant, suggesting a fraud in drawing him into those agreements; and advancing of several sums of money; and charging that he had demanded an account of the fishing transactions, and was denied it, and informed that the 1000*l.* advanced by him was not laid out on the fishing trade; and that appellant never entered upon, or carried on any fishery in *Scotland*; and that he, respondent, never was privy to the agreement in *September*, 1709, and therefore ought not to be bound thereby; and that the whole was a fraud, and carried on purposely to make a bubble of respondent; and prayed an account, and to be paid his 1000*l.* with interest and costs; and that appellant, 8th *January*, 1711, answered and denied all these allegations, and annexed a schedule of all his payments and disbursements; and *Stewart* and *Denn* likewise by their answers denied the allegations; and several witnesses were examined, and the cause heard before the Lord Chancellor, 28th *February*, 1712, who decreed *Stewart* and appellant to account with respondent for all sums of money paid by him to them, or either of them, in pursuance of the articles of 30th *April*, 1709, or of the agreement, 5th *May*, 1709, or any other subsequent agreement touching the partnership between respondent, *Stewart* and appellant, and between them and any other joint-adventurers with them in *North Britain*, and *Stewart* and appellant to pay what should thereupon appear due to respondent, with interest from the time respondent paid it, and respondent to be absolutely discharged from the articles, agreements and partnerships, and *Stewart* and appellant to indemnify him

him from all costs and damages whatsoever, touching the articles, or any partnership in respect thereof, and to pay costs of suit: And appellant complained that he was aggrieved by this decree, because it was founded on a supposition of fraud; that there never was any real and fair intention in appellant, and *Stewart*, to carry on the partnership, according to the articles or subsequent agreements of the 5th *May*, 1709; and that respondent was fraudulently drawn in by them to the said articles and subsequent agreements, whereas there was no proof in the cause to warrant such a supposition; and that appellant's whole conduct in the business, and the manner of his coming in, shewed that he meant and acted honestly, and that a loss which happened arose merely from misfortunes, and not from fault, and that it would be of mischievous consequence; to set aside agreements long acquiesced under, upon bare suspicions of fraud without proof.

P. King.
N. Leck-
mere.

Stewart, another partner, also separately appealed from the decree, and on his part shewed, that respondent was fully apprized, and approved of all that had been done: And from 30th *April*, 1709, the date of the first partnership, to the beginning of *November* following, paid 734*l.* and appellant remitted to *Pillans*, and that respondent in *August*, 1710, paid 199*l.* 4*s.* 10*d.* more, and appellant about that time had paid 706*l.* 12*s.* 9*d.* which sums were likewise remitted by appellant to *Pillans* on account of the fisheries, as was all other money paid by the partners; and that respondent in his bill further charged that an article in the indentures obliging him to submit to arbitrators before any suit commenced, was added without his privity; and this appellant, in like manner contended, that the decree was unjust, because there was no proof of any surprise or fraud, either in the said articles or execution thereof; and that it was a great hardship on him to be obliged to account for sums received on the partnership account, since he in pursuance of the articles paid those sums as well as his own proportion, to *Pillans*, who had upon oath acknowledged the receipt thereof; and was willing to come to an account on the foot of the partnership: And further, because respondent, was fully satisfied with all the transactions, and approved of them, and concurred in the directions given for carrying on the fishery from time

1713.

J. Jekyll.
Spencer
Cowper

time to time; and never called for any account till 1711, when he knew there had been considerable losses, to which appellant was equally liable: And finally, because respondent was privy to, and approved of the agreements made with *Gordon* and the others.

The respondent, in answer to both appeals, stated: That he, in 1709, lived at *St. Ives* in *Huntingdon*; and *Stewart* and *Pillans*, being natives of *Scotland*, and then merchants in *London*, where *Stewart* then resided, entered into the partnership as stated by appellants; and that besides what appellants had shewn, it was thereby convenanted that *Pillans*'s should not concern himself in any private trade or dealing whatsoever in the fishery business, without the special license of all the parties, in writing under their hands, and should keep books, fairly enter all fish and merchandizes caught, bought or received in, or sold or delivered out, and the prices, debts, receipts, and payments, and yearly, between 1st *November* and 1st *December*, transmit to *Stewart* and *Denn* true copies of all his accounts, and all letters and invoices, and all other transactions relating to the fishery, and that the accounts should be balanced to the 1st *November* yearly; and that *Mr. Bleau* should be their book keeper during pleasure; and that the books of accounts, letters, accounts, bills of lading, and other writings relating to the fishery, should always be kept in *London*, at the house of *Stewart* or *Denn*, where *Harkness* and *Pillans* might have free access, and peruse and copy them without interruption: And that none of the parties should sell or dispose of his share except by his last will, without the consent of the rest or two of them; and that the parties should meet once a year, between 1st *December* and 1st *January*, at *Stewart*'s or *Denn*'s, or other convenient place in *London*, and settle a plain account of stock, profits and losses; and that the accounts should be yearly balanced, and subscribed by all parties, and never after questioned, unless upon a palpable error; and that the profits should be equally divided every year: And that respondent, pursuant to the first and second agreement, deposited his part of the stock in the hands of *Stewart*; but that *Stewart* or *Pillans* did not bring in their proportions, either of the original or additional stock, though in the agreement of the 5th of *May*, it was artfully expressed, that each partner had actually brought in his proportion

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proportion of the additional stock: And that *Pillans* went into North-Britain under pretence of managing the undertaking in catching fish; but instead of catching and curing fish, the only thing the copartner-ship was to be concerned in, bought up cloths, serges, stuffs, and ratins, and sent them to the *Canary Islands*, and places where *Stewart*, who was a wine merchant, dealt, and with respondent's money carried on the wine trade: But that as to the trade intended by the articles, there was not the least proof that *Pillans* ever caught one single fish; and though *Pillans* by the articles, as supposed to be a person of skill in catching and curing fish, was to have the sole management with a salary of 250*l. per ann.* yet he owned by his answer, that he had not any experience or knowledge therein: And that respondent acquiesced, in expectation of great profit under the management of *Pillans* and *Stewart*, till about *July, 1711*, and then pressed *Stewart* to let him peruse the partnership accounts, and after many delays, and frivolous excuses, respondent was shewed very fine books neatly bound, which he was told were the partnership books; and respondent, not being versed in merchants accounts, carried an accountant with him to examine them; but when they came to be opened, to his great surprize, found them blank paper, without a word or figure written in them; and thereupon respondent finding that he had been fraudulently drawn in and imposed upon by the appellants, exhibited his bill for a discovery of their transactions under the partnership, and to compel them to repay him his money; and then the appellants insisted by their answers, that they had entered into a new partnership with five persons in North-Britain, for fifteen years, for respondent and *Denn* as well as themselves, and that the respondent ought to be bound by, and liable to that partnership, though they did not pretend respondent was ever previously acquainted therewith, or expressly consented to it; and that when the articles of that partnership were read at the hearing, which was the first time respondent ever saw or heard those articles, respondent or *Denn*'s names were not once mentioned in them, nor were they said to be entered into by appellants on the behalf of the respondent and *Denn*; and the articles appeared to be such, as put it into the power of the six North-British gentlemen, not only at their pleasure to dispose of his present stock,

but

{ 1713. } but to call for, and dispose of as much more of his money as they pleased: And that the schedules annexed to their answers, consisted of *Items* and particulars foreign to the fishing trade; and that appellants thereby endeavoured to charge respondent with considerable sums pretended to be laid out by the appellants, or one of them, in buying up cloths, serges, ratins, and stuffs, proper for their business, in the way of their trade or merchandize of wine; and though it did not appear that any fish was ever caught, yet *Pillans* charged respondent with his salary of 250*l. per ann.* and *Stewart* and *Pillans*, demanded an allowance from respondent, about 1000*l.* for salary exchange, and remittances of money from *Stewart* to *Pillans*, and from *Pillans* to *Stewart*, and for *Bleau's* salary for book-keeping, although no books were ever kept according to the articles, but said the books were kept at *Edinburgh*; and that appellants at the hearing insisted on several letters, some subscribed by respondent, and some by *Stewart*, respondent and *Denn*, as evidence of respondent's consent to the *Scotch* articles; but when the matter was examined into, it appeared that respondent was drawn in to sign such letters by fraud and imposition; and that the letters were brought ready wrote by *Stewart's* book-keeper to the respondent; and though the respondent was not by the *English* articles to concern himself in the management of the trade, yet he was thereby made to give directions concerning it, to the end that appellants might afterwards tell him he had approved what they had done, though he was then a perfect stranger to the *Scotch* articles: And respondent shewed that the Lord Chancellor spent about eight hours in hearing the cause, and declared " that respondent's proportion of the " original and additional stock was duly raised according " to the said articles and agreement, and deposited with " *Stewart*; but that *Stewart* and *Pillans* had not advanced and deposited their proportions of either; " nor had *Stewart* applied respondent's money as he " ought to have done, in pursuance of the said articles " and agreement, for the benefit of the partnership; " and that *Pillans* was fraudulently represented as a " person of skill in the trade of catching and curing of " fish, although it was admitted by him that he had " no experience or knowledge in the trade; and that " no such books of account appeared to have been " kept by *Pillans*, nor any copies thereof yearly trans-
 " mitted

"mitted by him, according to the articles, to *Stewart*
 "and *Denn*, nor were any books of accompts
 "provided and entirely kept by the said *Stewart* and
 "*Denn*, of the negotiations touching the partnership,
 "nor was any trade of catching and curing fish at any
 "time carried on, according to the articles or agree-
 "ment, but that a different trade and negotiation, not
 "warranted by the articles or agreement, was carried
 "on or pretended to be carried on by *Stewart* and
 "*Pillans*; and therefore respondent ought not to be
 "bound thereby, or affected with the consequence
 "thereof; and that the whole transaction plainly shewed
 "that there never was any real and fair intention in
 "*Stewart* and *Pillans* to carry on the partnership, ac-
 "cording to the original articles or subsequent agree-
 "ment, and that the respondent was fraudulently
 "drawn into the partnership; and that the whole was
 "carried on by *Stewart* and *Pillans* in fraud and de-
 "ceit of respondent." And did therefore order and
 "decree, as appellant *Pillans* had shewed: And for the
 "reasons set forth in the body of the decree, as the foun-
 "dation thereof, respondent insisted it appeared to be just,
 "and ought not to be reversed.

R. Ray-
mond.
S. Mead.

Die Lune, 22^o Junii, 1713. After hearing coun-
 cil on these appeals, it was ADJUDGED by the Lords
 that both should be dismissed, and the decree complained
 of affirmed. *Lords Journ.* vol. xix. p. 582.

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Richard

1713.

Richard Shee, Esq. Appellant. } *Et à Contra.*
Thomas Lawless, Gent, Respondent.

Case 86.

THE appellant *Shee* made this case: That *Thomas Denn*, Esq. 21st December, 1631, mortgaged the lands of *Lovestown* in the county of *Kilkenny*, in *Ireland*, to *Richard Lawless*, respondent's father, for 90*l.* for 199 years, from 25th *March*, then next, and afterwards 20th *May*, 1652, for valuable consideration sold and conveyed the equity of redemption to *Richard Shee*, Esq. deceased, appellant's grandfather; and that *Richard Lawless* died in 1662, leaving *Walter Lawless*, his eldest, and respondent his second son, and the premises being amongst other lands, soon after vested in King *Charles* the Second, by the act of settlement, *Walter* exhibited his claim before the commissioners, suggesting that the premises had been mortgaged in fee, and that he was intitled under a settlement made on his father's marriage; and, 30th *July*, 1663, was adjudged an innocent papist, and restored accordingly: And, 27th *April*, 1666, *Walter*, and respondent his brother, for valuable consideration, bargained and sold all their right and interest in *Lovestown*, to appellant's said grandfather, his executors and assigns; and covenanted that he, said *Richard* and his assigns, should quietly enjoy against respondent and his said elder brother, and against all persons claiming by, or under them, or either of them, and that by virtue thereof, appellant's grandfather became well intitled to the mortgage, whereof he had long before purchased the equity of redemption: And that, by indentures of lease and release, dated 1st and 2d *October*, 1672, executed in performance of articles made on the marriage of *Marcus Shee*, appellant's father, *Richard* and *Marcus* conveyed the mortgaged premises (amongst other lands) to the use of *Richard* for life, remainder to *Marcus* for life, with remainders over in tail-mail successively to the sons of *Marcus*; and that appellant's said grandfather, finding that these lands were part of the security allotted for the satisfaction of the forty nine officers, and that consequently his title under *Denn* was defective, 12th *October*, 1677, exhibited his petition before the commissioners appointed for settling that

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that security; stating, that the right of redeeming the premises was vested in his then majesty for the use of these officers, and that he was intitled to the preemption as the first discoverer, under the rules and orders then published, and prayed an adjudication accordingly, which was allowed; and the premises being valued by the commissioners, *Richard* paid his purchase money to Sir *Abel Ram* for the use of the officers, and thereupon the lands of *Lovefdown* were, by letters patent, dated 4th *May*, 1679, granted to him and his heirs, without any trust or saving whatsoever; and, 18th *March*, 1684, said *Richard* by his last will, devised all his lands to the uses contained in the marriage-settlement; and continued seised until his death, in *October*, 1687, and that then *Marcus* entered and enjoyed until 1691, when he died; by whose death appellant became intitled as his eldest son, and by articles, 6th *June*, 1697, in consideration of his marriage with *Dympna Barnwell*, Lord *Trimfstown's* sister, covenanted with Lord *Trimfstown* to settle *Lovefstown*, and other lands, to the use of him for life, with remainders to all his sons in fee-tail; and that after two descents, and an uninterrupted possession of 40 years under this title, when a new generation was sprung up, respondent, 25th *November*, 1707, filed a bill in the *Exchequer* of *Ireland* against appellant, suggesting that said *Richard Lawless* had assigned the mortgage to respondent by a deed or writing, dated 3d *March*, 1640, (whereas it appeared by respondent's answer on oath, that he was not then born) and also that his father had devised the lands to him by his will in 1662; that his elder brother *Walter* claimed the mortgage only in trust for respondent, that the inheritance and right of redemption was granted to colonel *Castle*, and that respondent purchased from the colonel's daughter, and that *Richard Shee*, appellant's grandfather, did, by obligation dated, 8th *February*, 1666, bind himself to the respondent in 1000*l.* with condition to be void, if he *Richard* should yield up the possession of the premises to respondent on the 25th *March*, 1674, and therefore prayed to be decreed to the possession of the said lands of *Lovefstown*, and an account of the profits since 1674: And that to this bill appellant, 17th *May*, 1709, put in a plea, and set forth the settlement made in performance of the marriage-articles, the adjudication and certificate of the commissioners, and the patent passed thereupon,

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thereupon, and pleaded that he was a purchaser for a valuable consideration, without notice of respondents pretended title; and that this plea was argued 3d *June*, 1709, and over-ruled, and appellant ordered to answer by the essoign day of the then next term; and accordingly appellant answered, and said he believed the said bond was fraudulently contrived, and insisted on the marriage settlement, certificate and patent, the long possession of him and of his ancestors; and upon the respondent's own conveyance executed in *April*, 1666: and 16th *August*, 1709, exhibited a cross-bill against the respondent, setting forth his title as before, and the stale and frivolous pretensions of respondent against his own deed, and a quiet possession of 40 years; and therefore prayed that respondent and his confederates might discover where the bond lay all that time, and whether any other writing or agreement had passed between the appellant's grandfather and respondent, or his brother *Walter Lawle/s*, concerning the lands of *Lovestown*; and that the appellant's title might be established: And that respondent answered, 23d *February*, 1709, and confessed, that appellant, his father, and grandfather, had quietly enjoyed for 40 years; and said he remembered no writing or agreement made between the appellant's grandfather and respondent, or his brother *Walter*, concerning the lands, except the bond and condition; and positively denied the conveyance executed by him in 1666, though it was fully proved in the cause: And that issue being joined in both causes, witnesses were examined on both sides, and appellant made undeniable proof of his title; and respondent attempted to prove the bond, by the single testimony of one *Walter Dobbins*, who by agreement was to have a third part of the lands in question, besides other gratuities for his evidence; and who afterwards in his last sickness, through remorse of conscience, owned his wickedness, and the great wrong he had done appellant, as had been proved in the cause: And that the respondent finding the pretences made in his original bill too weak, set up another pretence, and, 26th *June*, 1710, exhibited a *supplemental-bill* against appellant, suggesting that among some papers loosely kept, he found a deed-poll under the hand and seal of appellant's grandfather, dated in *October*, 1677, reciting that respondent being in *February*, 1666, lawfully interested in the lands of *Lovestown*, did put appellant's said grandfather in possession

fession thereof, and consented he should enjoy the same until 25th *March*, 1674; and that 90*l.* became due to respondent from said *Richard Shee*, for the profits received in the mean time, and therefore by that deed said *Richard Shee*, in consideration of being discharged of the 90*l.* undertook to obtain certificate and patent of the said lands in trust for respondent: And that appellant, 13th *November*, 1710, answered the supplemental bill, and insisted that he was a purchaser for valuable consideration, without notice of respondent's pretences, and that respondent had contrived that pretended deed of trust, which was inconsistent with what respondent had sworn in his answer to appellant's cross bill: And 11th *December*, 1710, appellant exhibited another cross-bill against respondent and his confederates, for a discovery of this new management and contrivance, and to know how respondent came by that deed, and why he had not mentioned it in his original bill, or in his answer to the first cross-bill, and why he lay still so many years without giving notice, or making a demand, though he lived in appellant's neighbourhood: And that respondent put in an answer to part, and a demurrer to the residue of the last bill; and by his answer confessed, that he had lived all along near the mansion-house of appellant's father, and grandfather, and said he did not forget the deed, or the contents thereof, but always remembered it, and always had it in his custody, but it did not come to his knowledge, among what papers it lay, till his son accidentally found it about a twelve month before: And that the causes came on to be heard 19th *February*, 1711, and were adjourned over to the 20th of *May* following; and upon the 18th of *July*, 1712, the court of *Exchequer* decreed the lands to respondent, on the said supposed trust, and referred the stating an account of the profits to the Remembrancer; and 2d *December*, 1712, the causes were re-heard; and 16th *February* following, Mr. *Baron Johnson* declared his opinion, that the respondent's bills should be dismissed without any trial at law; but the other two Barons directed a trial on this issue, whether the bond in 1666, and the deed in 1677, were executed by appellant's grandfather; and, 26th of *February*, 1712, ordered the issue to be tried by a jury of the city of *Dublin*, and would not permit it to be tried by a jury of the proper county, where the credit of the parties and witnesses were best known: And that *Shee* appealed from

1713. { from the orders of the 18th July, 16th and 26th February, 1712; and *Lawless* also appealed from these orders of 16th and 26th February, 1712; and appellant *Shce* insisted that the Lords ought by their final decree, to establish his title and possession, and dismiss respondent's bills with exemplary costs; because appellant was an innocent purchaser, without notice of respondent's pretensions, and the benefit of his plea ought to have been reserved to him, in regard the matter thereof was a good bar; and because appellant had both law and equity for him, and respondent only a bare pretence of the evidence of equity supported by a single witness, who by his own confession had been suborned to swear falsely: And further, because respondent had set up a variety of fraudulent and inconsistent titles, viz. 1. An assignment of a mortgage made to him expressly by name in 1640, when he was not born. 2. A devise made to him by his father in 1662, of the same mortgage when his father had no power to dispose, he being a non-cent person, and the mortgage then vested in the crown. 3. His brother *Walter*'s decree of innocency and the trust declared thereupon, which was both fraudulent and absurd; unless one man might be allowed to lend his innocency to save another man's estate. 4. A purchase under colonel *Castle*'s title, which was a mere fiction, and not one word of it in proof: And again, because the bond was apparently feigned and contrived, and the deed of trust intirely founded thereupon, must necessarily fall with it: And further, because it appeared on the face of the pretended bond and deed of trust, that both were grounded on a supposition that respondent was, in 1666, well intitled to the mortgage, whereas it was manifest that he had no manner of right thereto: And Edw. Norlastly, that if a trial at law were necessary, it ought to be by a jury of the County of *Kilkenny*, where the Rob. Raylands in question lay, where the parties and witnesses lived, and their credit was best known.

The respondent *Lawless*, on his part, stated: That *Patrick Denn* was seiled in fee of *Lovestown*, and had issue *Thomas* and *Margaret*; and *Richard Lawless*, respondent's father, married *Margaret*, and that *Patrick Denn*, and *Thomas Denn*, executed the mortgage of 1631, to *Richard Lawless*, for 90*l.* being part of his wife's portion: And that *Richard Lawless*, by an indorsement on that deed, dated March 3d, 1640, assigned

signed the mortgage to respondent his youngest son; and by his last will, dated *September* 8th, 1662, devised the mortgaged premises to the respondent, and the rest of his real estate to his eldest son *Walter*; and that *Patrick* and *Thomas Denn* were attainted of treason in *Ireland*, in 1641; and that the estate of *Richard* and *Thomas Lawless*, was in the time of *Cromwell's* rebellion, seized and sequestered, and so continued till after the restoration; and that *Walter Lawless*, the eldest brother, in 1663, claimed his paternal estate, and also *Lovestown*, as an innocent papist, and his claim was allowed, and he put into possession; but gave a declaration of trust as to *Lovestown*, to respondent, who enjoyed it; and that in 1664, *Walter* joined with respondent in a lease of *Lovestown*, to one *John Fitz-Gerald*, who paid the rent to respondent: And that *Lovestown*, the equity of redemption and inheritance whereof was forfeited in 41, by the attainder of the said *Patrick Denn*, were, among other lands, set out and allotted to Colonel *James Castle*, for his service to the crown in *Ireland*, before 1649, subject to respondent's mortgage: And that colonel *Castle* had issue *Anne*, who married *Thomas Tomlins*; and respondent, in 1665, purchased from *Tomlins* and his wife the equity of redemption and inheritance of *Lovestown*, but that *Tomlins* and his wife afterwards surrendered *Lovestown* to the crown, without respondent's knowledge, without taking any notice of the sale before made to him, and thereby the equity of redemption and inheritance of *Lovestown*, became again vested in the crown: And that *Richard Shee*, appellant's grandfather, who was council for respondent and *Walter*, and had full knowledge of their just title, in 1666, pretended that a debt of 100*l.* was due to him from *Thomas Denn*, respondent's uncle, and that he had promised to secure it on *Lovestown*; and that said *Patrick Denn*, and *Thomas* his son, had, in 1652, conveyed their equity of redemption to him, although they had forfeited in 1641; and notwithstanding *Shee* well knew of respondent's prior mortgage, yet he threatened that he could create a forfeiture of the whole estate of the family, unless respondent would permit him to hold *Lovestown* until Lady-day, 1674, in satisfaction of his pretended debt of 100*l.* and that respondent, for quietness sake, submitted, and put him into possession accordingly: And the said *Richard Shee*, the 8th of *February*, 1666, executed a bond of

1713. 1000*l.* penalty, conditioned, to restore the possession to respondent on the 25th of *March*, 1674: And that *Shée* accordingly enjoyed *Loveflowen*, not only to the 25th of *March*, 1674, but under the same trust held over for 3 years longer; and the premises being then 30*l. per ann.* these 3 years value amounted to 90*l.* which respondent frequently demanded; but *Shée* threatened to discover not only the defect of respondent's title to *Loveflowen*, but to subject the rest of the family estate to a forfeiture, in case respondent should persist in his demands: And that thereupon respondent and *Shée* came to a second agreement, by which the respondent remitted the 90*l.* and in consideration thereof, *Shée* executed a declaration of trust, dated *September* 3d, 1677, reciting the condition of the former bond, and agreed that he, at his own expence, would discover the forfeiture of the equity of redemption of the premises to the commissioners, and take out a certificate, as first discoveror, and pass patent in his own name, but in trust for respondent; and would immediately thereupon put the respondent in possession thereof, pursuant to the deed of trust: And that *Shée* continued in possession; and in 1679, past patent to him and his heirs, subject to the trust, though not expressed in the patent: And that whilst this matter was in agitation, the bond and deed of trust, with other deeds and papers, were mislaid, and not to be found by respondent; and that *Shée* being well apprized thereof, very unjustly set up an absolute title in himself under the patent: And that respondent frequently demanded the possession from *Shée*, who refused to deliver it, though, in 1687, some short time before his death, he publicly confessed that he had executed such bond and deed of trust to respondent; but still threatened, that if respondent gave him any trouble, he would discover, and subject the rest of the family estate to a forfeiture: But he soon after died, and his eldest son *Marcus* entered, and with-held *Loveflowen* from respondent; and the troubles in *Ireland* happening, *Marcus* soon after died; and appellant, as his eldest son and heir, entered and with-held *Loveflowen* from the respondent, who continually claimed it, though his said bond and deed of trust, with other papers, were unfortunately mislaid; but that the bond being found some years since, the respondent again demanded his estate, and an account of the profits from appellant; and in

November,

November, 1707, preferred his bill in the *Exchequer* in Ireland, as stated by appellant: And that appellant pleaded first an outlawry for debt, and that being reversed, appellant then pleaded a pretended release from respondent and his brother *Walter*, to *Richard Sher*, appellant's grand-father, and several other matters, which were over-ruled. Whereupon the appellant answered, and insisted on the conveyance from the *Denn*'s in 1652, and the pretended release in *April*, 1666, which (if any such there was) respondent said he was prevailed upon by appellant's grandfater to execute, in order to facilitate the passing the intended grant in trust for respondent, that respondent's title might not obstruct the passing it: And respondent insisted that the marriage settlements relied on by appellant were voluntary, being executed after the marriage, and the lands of *Lovestown* not mentioned in any of the articles before the marriages; and respondent shewed the proceeding stated by appellant, and that the Court took time to consider from the 20th *May* to the 18th of *July*, 1712, and then unanimously decreed the premises to respondent, and an injunction to put him in possession thereof, and that appellant should account for the profits, from the 3d of *September*, 1677: And respondent stated, that immediately thereupon several popish persons, by appellant's directions, were sent post to respondent's house in the County of *Kilkenny*, before respondent knew the decree had passed in his favour; who, with fire arms and other weapons, under colour of a warrant to search for stolen goods, though none were lost, dragged respondent down stairs by the hair of his head naked out of his sick bed, and in that manner carried him away about a mile, threatening that he should rot in gaol, unless he would then release all his right in *Lovestown*, which appeared by affidavits read in the Court of *Exchequer*; but that not prevailing to obtain a release, appellant applied for a re-hearing; and the cause was accordingly reheard the 2d of *December*, 1712, the 16th and 26th of *February*, following, when the Court ordered a trial at law at the *Exchequer* bar, on the issue stated by appellant; and that appellant now complained of that issue, though he desired it by his petition for a re-hearing; and respondent himself appealed from the orders, directing the issue in regard to the bond and deed, had been fully proved on the hearing, by several credible living witnesses;

1713. } nesses: And insisted that the decree of the 18th of July,
1712, ought to be affirmed.

Spencer
Cowper
W. Peere
Williams.

Die Sabbati, 27^o Junii, 1713. After hearing
council upon both appeals, it was ORDERED by the
Lords, that both petitions and appeals should be dis-
missed. *Lords Journ.* vol. xix. p. 588.

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1713.
}

William Despard, Esq. *Thomas Croasdaile*, Esq. and others, Executors of the last Will of *Thomas Croasdaile*, Esq. deceased, } Appellants.

Arthur Ormsby, Esq. *Dorothy* his Wife, *William Usher*, Esq. and *Letice* his Wife, } Respondents.

THE appellants made this case: That Sir *Henry Caſe* 57. *Waddington*, Knt. being ſeiſed in fee of the lands of *Woodford*, in the county of *Galway*, in *Ireland*, and of certain iron-works, and woods of little value thereon, and intitled to a term of years in the lands and iron-works of *Scariffe*, in the county *Clare*, and having one ſon, *Digby*, and two daughters, reſpondents *Dorothy* and *Letice*, (the ſon a young child, and the youngeſt daughter about 17) by his laſt will in writing, deviſed all his lands and real eſtate whatſoever, (ſubject to certain payments) to his ſaid ſon in tail, remainder to his daughters, and the heirs of their bodies, iſſuing reſpectively; and directed that his eſtate ſhould be managed by his executors, or the greater number of them, until his ſaid daughters ſhould be diſpoſed of in marriage; and appointed Dame *Abigail* his wife (during widowhood only) *Simon*, then Biſhop of *Limerick*, afterwards tranſlated to *Elphin*, Duke *Gifford*, *Gilbert Ormsby*, *Simon Purdon*, Eſqrs. *Zachary Ormsby*, Clerk, and *Thomas Croasdaile*, executors; and in caſe *Croasdaile* would undertake the management of teſtator's real and perſonal eſtate, and make it his only buſineſs, then he recommended to his other executors to allow *Croasdaile* 10*s.* per ton, if 200 tons of bar-iron were made yearly in the works, and 15*s.* for each ton of bar-iron made yearly over and above 200 tons; and ſoon after died, and his ſon *Digby* alſo died in a few months after, and Dame *Abigail* and *Croasdaile* proved the will, but the other executors alſo acted, and nothing was done without their concurrence: And, in 1692, the iron-works of *Scariffe*, with the appurtenances, were let by Dame *Abigail* to *John Emerton*, Eſq. at the yearly rent of 500*l.* and reſpondent *Dorothy* ſoon after married *Robert*

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bert Tempest, Esq. who took upon him the management of the real estate; and the iron-works of *Woodford* being in a ruinous condition, and the woods almost destroyed by soldiers, and common trespassers, during the late troubles, the executors and co-heirs unanimously resolved to let the same; and *Emerton* treated with *Tempest*, and, by a proposal in writing, offered to pay 150*l.* per ann. for the iron-works and lands of *Woodford*, with the privileges thereto belonging, and particularly the liberty of raising cinders, and making use of the woods which belonged to Sir *Henry Waddington*, within three miles of the works; which proposal the executors approved of; and *Gilbert Ormsby*, one of the executors, (respondent *Arthur's* father) by their direction, impowered *Tempest* and *Croasdaile* to agree with *Emerton* accordingly; and they, 7th February, 1692, by a deed written on the back of that proposal, agreed to let the works of *Woodford*, with those privileges, to *Emerton* for seven years, from the 1st of *May* following, at the yearly rent of 150*l.* and covenanted, that all the parties interested should, upon demand, make him a lease in due form; and under this agreement *Emerton* entered about *May*, 1693, and managed the works wholly with his own stock, and for his sole benefit, until *June*, 1694, and then finding that he could not well carry on the undertaking without the assistance of *Croasdaile*, who was skilled in such works, and had great quantities of cord-wood thereabouts, pressed *Croasdaile* to become sharer with him in the works of *Woodford* for a third part; and *Thomas Croasdaile*, who had long before been discharged from the management of Sir *Henry Waddington's* real estate, was at length prevailed on to become *Emerton's* partner in the works of *Woodford*: And *Emerton* accordingly, by articles, 14th June, 1694, granted and assigned to *Croasdaile* a third part of the iron-works of *Woodford*; and *Croasdaile*, in consideration thereof, granted to *Emerton* two thirds of his woods at the same price he had paid for them; and about that time respondents, *William Usher* and *Leticia*, intermarried: And in *September*, 1696, *Emerton* having affairs of consequence to manage in *England*, proposed to surrender his lease of *Scariffe*, but respondents refused to accept it, unless he paid down 600*l.* which he accordingly did; and thereupon surrendered his interest in both the iron-works, with a saving of the third part, which *Croasdaile* had in *Woodford* works; and *Croasdaile* at

at the same time offered to surrender his third part also, provided respondents would allow him a reasonable time to work up his mine; but Dr. *Zachary Ormsby*, one of Sir *Henry Wadington's* executors, persuaded him to take the intire works of *Woodford* on the same terms *Emerton* had held them; and thereupon respondents, *Usher* and wife, by indented articles, dated 17th *October*, 1696, agreed, in behalf of themselves, and of *Tempest*, and respondent *Dorothy*, then his wife, to demise unto *Croasdaile* the town and lands of *Woodford*, twenty-five acres in *Killageton*, seventeen acres in *Claucot*, twenty-one acres in *Derryrag*, and two acres in *Dromeneecotty*, with the iron-works, woods, and other appurtenances, for twenty-one years from the 1st of *May*. next ensuing, under the yearly rent of 150*l.* with a proviso, that if *Tempest*, and *Dorothy* his wife, (who were then in *England*) should not give their consents to that agreement, and signify the same in writing, under one or both their hands, before the 10th day of *December* following, the articles should be void: And that respondent *Dorothy*, by a letter from *London* to *Thomas Croasdaile*, dated 4th *May*, 1697, consented to the articles, and said she wondered he had not received former letters, which she, and her husband, had sent, to signify their consents; and added, that Colonel *Tempest* was in the country; but as soon as he came to town *Croasdaile* should have both their consents in form; and thereupon *Croasdaile* entered and enjoyed the iron-works of *Woodford*, with the other premises therewith demised, and duly paid the reserved rent to Colonel *Tempest* during his life, and took his acquittances in full; and Colonel *Tempest* dying in 1699, respondent *Dorothy* afterwards married the respondent *Arthur Ormsby*, and during her viduity, she and all the respondents, for many years after, received this rent and gave receipts in full; and so far from pretending that the lease was unfairly obtained, or the iron-works under-let, that respondents *Ormsby* and wife exhibited a bill against *Croasdaile*, in his life-time, to compel him to accept of a lease in due form, and to execute a counterpart: And the Earl of *Claunrickard* being seised in fee of a great part of the lands of *Dromeneecotty*, in 1697, sold the woods thereon standing to *Henry Barger*, Gent. who cut part to his own use, and afterwards sold the remaining part of those woods to *Croasdaile*, who also dealt for other woods, and took many beneficial farms, and

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by his great industry, acquired a considerable fortune, and died about *October*, 1709, having first made his will, and appellants executors: And that Sir *Henry Wadington*, by a lease from the Earl of *Clanrickard*, held thirty-six acres of unprofitable land in the mountains of *Sleubaghty*, through which the water passed to the iron-works, which was the only use or profit that could be made of these thirty-six acres; and the former term being expired, *Croafdaile* took a new lease thereof from Colonel *Thomas Burke*, who had married the Countess of *Clanrickard*: And that respondents, 7th *February*, 1709, exhibited their bill in the *Exchequer of Ireland* against appellants, as executors of *Croafdaile*, for an account of the personal estate of Sir *Henry Wadington*; and also an account of the third part of the profits of the iron-works of *Woodford*, from 1692 until 1696, and of the entire profits thereof from 1696, on pretence that the lease made to *Emerton* in 1692, was obtained by misrepresentation of the value, and that there was some previous agreement to admit *Croafdaile* into a partnership; and an account of the profits of all the woods bought by *Croafdaile*, as being taken in trust for respondents: And that to this bill appellants, in *June*, 1710, answered as to part, and said they were absolute strangers to the matters suggested in the bill; but that amongst *Croafdaile*'s papers they found a draught of an answer, which they believed he intended to put into the former bill exhibited by respondents *Arthur* and wife, and set it forth verbatim: And as to that part of the bill which required an account of the woods bought by *Croafdaile*, pleaded that he was a purchaser thereof for valuable consideration, without any fraud or trust: And to this answer and plea respondents replied, and issue being joined, witnesses were examined, and the cause heard 22d *February*, 1710, and appellants complained that they were deprived of the benefit of several material depositions, on pretence that the interrogatories were leading; and the Court of *Exchequer* decreed, 'That the agreement made with *Emerton* in *February*, 1692, for the iron-works of *Woodford*, as to a third part thereof, should be deemed a trust for respondents; and that appellants should account for the full profits of that third part, from the commencement of *Emerton*'s interest to the 1st day of *May*, 1697, and that the agreement made by *Croafdaile* with respondent *Usher* should be set aside; and that appellants should account with respondents

dents for the full clear profit of the works and premises, since the commencement of that agreement; and for the value of the woods cut down by *Croasdaile*, on the lands so demised to him, since the commencement of that demise to the time of his death; and that the lease taken by *Croasdaile*, in his own name, of the said thirty-six acres in *Slewbaghty*, should be deemed a trust for respondents; and that appellants should account for the profits thereof since the death of Sir *Henry Wadington*; and directed several issues to be tried for ascertaining the profits respectively during these several times: And on a re-hearing, 9th *May*, 1711, on appellants petition, ordered, That appellants should account with respondents for all the timber and bark cut, stripped, or made use of by *Croasdaile*, on any of the lands held under *Emerton's* contract, except such timber as was used in necessary repairs on the premises; and also for the profits of the thirty-six acres in *Slewbaghty*, from Sir *Henry Wadington's* death; and reserved the judgment as to the other points, until the value and profits be ascertained by a trial at law; for which purpose they directed the several issues to be tried by a jury of the county of *Galway*, at the bar of the court of *Exchequer*; and a trial was accordingly had, and the jury found that *Croasdaile* had made 63*l.* 7*s.* 2*d.* clear profit yearly, from the 1st *May*, 1693, to 1st *May*, 1697, of the third part of the iron-works and lands, and of the cord-wood cut thereon; and found the yearly value of all the works, lands, and wood cut thereon, to be 233*l.* yearly, from the 1st *May*, 1697, to the 1st *May*, 1711, inclusive; and that the clear yearly profit thereof, above the reserved rent, was in those years 83*l.* per ann. and found the value of the wood, timber, and bark, (over and above what was made use of in necessary repairs) from 1st *May*, 1693, to *Croasdaile's* death, to be 1850*l.* and the clear profit of *Slewbaghty* to be 2*l.* 10*s.* a year; which verdict was confirmed by an order made the 12th of *November*, 1711: And appellants shewed that on the hearing and re-hearing they pressed that the issues to be tried might be, Whether any agreement was made between *Emerton* and *Croasdaile*, at or before the time of making the demise in 1692? And what the real value of the said lands, woods, and iron-works then were, to be let for seven years to a responsible tenant; but the court would not direct either of those issues to be tried; but without any evidence of a previous trust between *Emerton* and *Croasdaile*,

1713. *daile*, and, notwithstanding the repeated subsequent agreements of respondents, on the 8th December, 1711, decreed, that appellants should account for the profits and value, according to the verdict, without any allowance for the management of the iron-works: Which decree, orders, and issues, appellants insisted were unjust; because the demise to *Emerton* was with the unanimous concurrence of the executors and coheirs of Sir *Henry Wadington*, and the rent thereon reserved, was as much as the works with the appurtenances could then be let for to a responsible tenant; so that no fraud could be imputed to *Croasdaile* in that particular: And again, because there was no evidence of any agreement made between *Emerton* and *Croasdaile*, at or before the demise, to let *Croasdaile* into a partnership; on the contrary it appeared that *Croasdaile* gave a consideration about a year and a half after, to be admitted sharer for a third part: And finally, because the agreement in 1696, was made at the earnest entreaty of Dr. *Zachary Ormsby*, and respondent *Usher*, with full notice of all the precedent transactions, and of the value of the premises; and confirmed by repeated acts of respondents, and all the parties concerned, during the space of thirteen years.

E. Northey.
Spencer
Cowper.

The respondents, in affirmance of the decree, in addition to the facts stated by appellants, shewed that Sir *Henry Wadington* finding himself in a declining state of health, and intending that the works should be carried on after his death for the benefit of his children, who were all infants, pitched upon *Croasdaile*, a relation whom he had instructed and bred up in the business, and who had become very able and skillful in the management of the works, and all other his concerns; and by his will devised all his real and personal estate, in failure of issue in his own children, to *Croasdaile* and his heirs male; and therein particularly recommended to *Croasdaile* the management and overseeing his iron-works and other concerns, and left it to the rest of the executors to allow him what yearly salary they should think fit for his care and trouble therein; and gave him a legacy of 20*l.* for his last year's service, and directed he should have the allowances stated by appellants; and then added, "If my kinsman, *Thomas Croasdaile*, should be so unkind and unconcerned for my family, as to refuse or neglect to manage the estate and iron-works, for the consideration *afore-mentioned*, or such other reasonable allowance " and

“ and compensation as my executors, or the greater
 “ number of them, shall agree to, or shall not give a
 “ just account of his trust, he cannot expect to deserve
 “ the kindness intended him in bringing him in, and en-
 “ titling him to the reversion of my whole estate, real
 “ and personal, if all my children die without issue,
 “ and disappointing my heir at law: And that *Croaf-*
daile, after Sir *Henry*’s death, managed all the estate,
 and in 1692, instead of carrying on the works of *Scar-*
riffe he made a lease thereof to *Emerton* for thirteen
 years, at 500*l.* a year, and got lady *Wadington* to join
 with him therein, which was the only act he did as ex-
 cutrix: As to the works at *Woodford*, he insinuated to
 lady *Wadington* and respondents, the daughters, that
 those works would be a loss to them if they should carry
 them on, and proposed to take a lease thereof, with
 other lands, at 80*l.* a year, although he told them, he
 believed it would break him if he should take it at that
 rent, but they rejected this offer; and finding himself
 disappointed, resolved to compass his ends by an under-
 hand treaty with *Emerton* for his taking a lease at 150*l.*
 a year, but *Croafdaile* to go a sharer a third part; and
Croafdaile affirmed to the respondents, the daughters,
 who were then under age, that it was a greater rent
 than any one else could or would give for same; and
 they trusting entirely to *Croafdaile*, consented, and ac-
 cordingly the articles were entered into for a lease to
Emerton of the iron-works and lands at *Woodford* for
 seven years, with a clause of renewal for seven years
 more: And that respondent *Dorothy*, whilst under age,
 was married to Colonel *Tempest*, whom *Croafdaile* got
 to sign the articles, though concluded previous to his
 marriage, and he no party; and though *Croafdaile* was
 entitled from the beginning of *Emerton*’s lease to one-
 third part, yet the agreement between *Emerton* and him
 was postponed to be actually executed till the 14th of
June, 1694, merely to colour the transaction: And
 that *Croafdaile* resolving to ingross the whole to himself,
 in *Emerton*’s absence in *England*, made him uneasy at his
 works of *Scarcliffe*, by diltraining all his carriage horses
 for rent a few days after it became due; so that *Em-
 erton* was resolved to get rid of *Scarcliffe*, and, about Oc-
 tober, 1696, offered 600*l.* to *Croafdaile* to accept a sur-
 render thereof, which *Croafdaile* would not accept un-
 less *Emerton* would surrender up *Woodford* works also,
 with a saving in such surrender for *Croafdaile*’s third

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part

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part therein, which *Emerton* agreed to, rather than endure such hardships; and a surrender of both, with such a saving, was accordingly made: And that *Croasdaile's* being thus interested in a third part, rendered it impracticable to let the other two-thirds; wherefore *Croasdaile*, after *Emerton's* agreement to surrender, and before the surrender made, applied himself to *Usber* in *Dublin*, who was then married to *Leticia (Tempest)* and *Dorothy* being then, and for some years before out of the kingdom) that he might have a lease for 21 years of *Woodford* works, and the lands held by *Emerton*, at the old rent of 150*l.* a year, and which *Usber*, being a stranger to the value, and to *Croasdaile's* fraud, consented to; and thus the articles between *Usber* and *Croasdaile* were entered into: And that the woods cut down by *Croasdaile* on the lands of *Woodford*, and other lands thereabouts, would, if yet standing, be worth 5000*l.* and for these woods *Croasdaile* never accounted: And that respondents, in *March*, 1709, filed a bill for an account against *Croasdaile*, but he died about three months after, before he answered, and then respondents filed their bill against appellants, his executors, as stated by appellants; who put in an answer, which they said *Croasdaile* in his life-time had prepared to the bill exhibited against him by respondents *Ormsby* and wife, and confessed assets: And upon a trial of the issues directed by the decree at the *Exchequer* bar, and after a full hearing the jury ascertained the several values of the woods and iron-works, amounting in the whole to 3507*l.* 7*s.* which was 6000*l.* less than respondent ought to have had; and though appellants had voluntarily near a year since paid and secured all the money decreed, with the cost of suit to respondents, they now appealed from the decree: And respondents stated that appellants complaints against the decree were, because the Court refused to let the bill filed by respondents *Ormsby* and his wife against *Croasdaile*, and also against *Usber* and wife, to compel him to pay his rent reserved on his articles, and to perfect a counterpart of the same, be read on the hearing; and 2dly, that the issues contended for by appellants were not directed: And to these objections respondents answered, that that bill was never prosecuted, nor any answer put in thereto; and it was the constant course of equity not to admit such a bill to be read as evidence: That it was in proof in the cause that *Croasdaile's* agent as well as *Emerton's* managed the works

works from the beginning, and that the profits were divided between them according to their respective shares, and each paid his own servants; and that *Emerton* sent a message to *Croasdaile* previous to the lease, that if *Croasdaile* would procure the lease, he, *Croasdaile*, should go sharer with him one third. All which necessarily implied an agreement before the lease, though the agreement was not reduced to writing for above a year and half after *Emerton's* lease, the better to conceal and colour such fraudulent conduct in *Croasdaile*, and that this and the lease afterwards procured from *Usher*, was a manifest breach of trust in *Croasdaile*, and therefore he ought to answer what he made of the lands, woods, and works, and not what they might be let for: And respondents contended that, after appellants had submitted to the issues directed by the decree, and made full defence on the trial, they ought not to be admitted to complain of the decree; and the rather, as appellants had long since paid the money, or secured it, and respondents had given discharges for it, appellants were concluded to complain of the verdict: Wherefore respondents insisted the lords should affirm the decrees, verdict, and subsequent proceedings, and dismiss the appeal with S. Mead. cost.

Die Luna, 6^o Julii, 1713. After hearing council upon this appeal, it was ADJUDGED by the lords that the same should be dismissed, and the decrees, orders, and proceedings complained of affirmed; and that appellants pay respondents 6*ol.* for their costs. *Lords* *Journ.* vol. xix. p. 600.

F I N I S.

H h 2 A T A B L E



A

T A B L E

OF THE

PRINCIPAL MATTERS

Contained in this VOLUME.

ACCOUNT.

A. sends *B.* as a factor abroad to buy merchandize, and commissions him to draw on a foreign merchant for the amount, which he does in the account furnished: *A.* gives credit for the amount of the bills drawn as cash; but the bills are not accepted by the contrivance of *A.* *B.* shall not be concluded by that account, but shall be paid notwithstanding. (*Warr v. Præd.*)

A. indebted to *B.* 600*l.* *Page 57*

finds him in great distress, and gives him 50*l.* as a loan, and takes his promissory note as for money borrowed, this note not evidence that *B.* was not indebted in the larger sum. (*Warr v. Præd.*)

A Governor of one of the *Bahama Islands*, near which a Dutch ship richly laden was cast away, on pretence of recovering the cargo for the seamen, seized

it all to his own use, as wreck-fishing; on his return to *England*, was decreed to account for the whole. (*Trott v. le Cle.*)

If the immediate parties to a dealing account together, the representatives of either shall not be received to object to it. (*Gee v. Lewis.*) *Page 219* 416

ADMINISTRATOR.

See Executor.

AGENT.

If an Agent without fraud put out his friend's money upon a defective security, he shall not be decreed to make it good. (*Luke v. Bridges.*) 140

AGREEMENT.

To procure *A.* to convey to *B.* decreed to be performed in specie. (*Bradshaw v. Sutton.*) 25 *A. sup.*

[A TABLE of the Principal Matters.]

A. supposing he has right, enters into an agreement to sell to *B.* who brings a bill for specific execution against *A.* and also against *C.* who appears to be the true owner, and so insists in his answer. This bill dismissed, as well against *A.* as *C.* (Cornwall v. Williams.) Page 117

A. on his daughter's marriage agrees to pay down 10,000*l.* and to pay 10,000*l.* more within six months after his death: *A.* cannot be compelled during his life, to give security to pay the second 10,000*l.* (Earl Warrington v. Langham.) 149

Parol evidence not admitted to vary a written agreement; for if the agreement were as alleged, it is a fraud to reduce it to writing differently. (Tidcombe v. Cholmley.) 166

A party to an agreement cannot allege it unfair against a person to whom it is assigned, he himself being a subscribing witness to the assignment. (Firebrace v. Moore.) 188

Agreement to pay 600*l.* on the other's procuring a commission of captain in the marines for him, and bond for the money if the commission be procured accordingly, though the obligor refuse to accept it, on the scruple of taking an oath required by statute, yet he will not be relieved against the bond in a court of equity. (Ivye v. Ash.) 267

A. enters into an agreement in writing with *C.* for the purchase of an estate, if a good title could be made. *B.* (a stranger) afterwards files a bill, claiming

part of the lands. *C.* buys in his claim. *C.* is intitled to a specific execution of the agreement. (Masters v. Cooke.) Page 433

A M E N D M E N T.

After a writ of error in Parliament in a judgment of discontinuance, the Lords remitted the record to be amended. (The Queen v. Ford.) 332

A N N U I T Y.

Provided by marriage articles to be paid the wife if she survived, out of the husband's real estate; if that fund fail, decreed a charge upon his personal property. (Griffith v. Anvill.) 52

Arrears. *It seems* that arrears of an annuity, or jointure, which accrued due during the time of a public rebellion, cannot be recovered under a bill in equity. (Kirby v. Ormsby.) 134

A P P E A L.

If the Parliament be prorogued pending an appeal, the party may proceed in Chancery on the account decreed there, notwithstanding the appeal. (Popham v. Bampffield.) 2

An appeal cannot be maintained where the matters complained of have been once settled by the Lords. (Horner v. Popham.) 8

And see (Woodman v. Wyloughby.) 44, 77

After an appeal a petition was entertained

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entertained to explain the decretal order as to costs. (Bretland v. Cape.) Page 97

A person not a party in the original cause, will not be suffered to interplead by a petition of appeal. (Handcock v. Shaen.) 122

There not being proper parties to the original decree, is a good ground of appeal.

A party under terms to pay a sum of money in the original cause, declining to do so, and bringing an appeal in order to avoid it, his appeal dismissed with costs. (Hyndmarsh v. Eversard.) 241

A council, or agent, preparing or signing an appeal with words reflecting on the respondent, called to the bar and reprimanded. 245

Appellant's idleness, and his solicitor's ignorance, no ground for an appeal. Proofs cannot be used before the Lords which the party neglected to produce in the Court below. (Prise v. Button.) 246

A person apprehending himself injured by a general order of a Court not made in any cause (as for the filing an antecedent record which had been many years mislaid) may bring an appeal to the Lords; and the person at whose instance the order was made, cannot decline the Lord's jurisdiction, by alleging that it is an original, and not an appellate jurisdiction; or that multitudes not before the house are interested in the record. (Wharton v. Squire.) 276

Where the decree or order

appealed from, is expressed to be made upon appellant's own consent, the appeal will be dismissed. (Northcote v. Northcote.) Page 287

The neglect of a party's own fix-clerk no ground for an appeal. (Deye v. Stephenfon.) 357

If the defendant's plea to a bill in equity (*v. g.* purchaser without notice) be falsified by verdict, his appeal will be dismissed. (Lewes v. Fielding.) 364

An appeal to the Lords lies from the Lords of Session in Scotland in a matter of Ecclesiastical cognizance, though there were an appeal from the Presbytery to a provincial synod. (Greenfields v. Magistrates of Edinburgh.) 427

An appeal brought on grounds known to the appellant himself to be frivolous and false, dismissed with exemplary costs. (Shire v. Cock.) 437

After a party has once agreed to certain issues to be tried, he shall not make the impropriety of those issues a ground of appeal. (Despard v. Ormby.) 459

A Matter of Equity. See the case of A R M Y.

If an Army-Colonel make an assignment of the regimental off-reckonings for any year, for the cloathing of that year, and have himself previously anticipated that year's off-reckonings for the cloathing of the foregoing year, he shall be personally answerable, if the agreement be worded so as to charge him. (Tidcombe v. Cholmley.) 166

ASSETS

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ASSETS.

A. indebted to *B.* agrees in writing to mortgage certain lands, but dies before the mortgage executed: these lands affects applicable to pay *B.*'s debt before any other of *A.*'s creditors. (Shepherd v. Kent.) Page 253

Assets in equity are assets at law.—And therefore on a plea of *plene administravit*, evidence that the executor released a claim to divers rights for a certain sum, and that within 400*l.* of that sum would not have been paid but for a chattel interest released among the rest, is evidence of assets to the amount of 400*l.* (Plunket v. Bishop of Dro-more.) 421

AVENOR.

What this officer was. 314

AWARD.

An award made by an arbitrator, who had been convicted of perjury, decreed void; and because it appeared to be made partially and maliciously. (Parker v. Burroughs.) 257

BILL.

One party exhibits a bill to be decreed to a matter about which an award had been made, without taking notice of the award, and the other party insists on the award; and then the first party files a supplemental bill, stating and objecting to the award, and the other party ex-

hibits a bill to carry the award into Execution. The Court decreed upon the matter of right originally insisted upon, and left the matter of the award open to each party to take his legal remedy; but the Lords reversed the decree, and sent back the cause, that both causes might be heard upon the whole matter. (Hamilton v. Stephenson)

Page 209
A. plaintiff, files an original bill against *C.* who after answer files a cross bill against *A.* and makes *B.* and *D.* parties, and obtains an order that the plaintiff in the original cause shall stop till the defendants answer the cross bill; which *A.* does, but *B.* and *D.* are never served with any process: For this ar-tifice the cross bill was dismissed. (Shere v. Cock.) 437

BOND S.

Bond for 200*l.* to pay 100*l.* Subsequent bond many years after for the same sum from the same parties, 107*l.* 10*s.* paid, receipt passed, but neither bond given up: Latter bond sued for. Issues directed, 1*st*, Whether this bond satisfied or not? 2*d*, Whether there were two bonds or not? and, Whether both satisfied or not? And on verdicts that both were paid, appeal from a decree that both be cancelled, dismissed. (Brown v. Bradford.) 8

BUILDING.

A. devises that a house shall be

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be finished according to *the model* and design began by him. It shall be finished according to the model, and what might have been his intention and fancy shall be no guide. (Lord Conway v. Duke of Buckingham.)

Page 411

CHANCERY.

Though a cause in Chancery be heard before the Master of the Rolls, the decree must import to be made by the Lord Keeper of the Great Seal or the Lord Chancellor: And this is the form in Chancery. (Sherard v. Harcourt.) 233

CHARITABLE PURPOSES.

A fund appropriated to charitable purposes, and vested in trustees, if the fund increase the charities shall be augmented, and the increase shall not benefit the trustees. (Attorney General v. Mayor of Coventry.) 280

CHURCH.

Where a chapel of ease is erected at the charge of the parishioners, and the curate to be maintained by their voluntary contribution, the right of nominating the curate may be referred to the bishop of the diocese, or he may, with the bishop's consent, be chosen by the parishioners. (Attorney General v. Bishop of London.) 399

And if a bill be brought to determine in whom the right of nomination of such curate be

vested, be dismissed, and that dismissal affirmed on an appeal. If the parish afterwards elect a curate, and he presume to disturb the church, on a bill brought by the bishop's curate, the usurper and the chapel-warden shall account for the profit received, and be examined on interrogatories, and pay costs. (Burton v. Bishop of London.)

Page 403

A priest ordained by an ex-auctoritate bishop, not to be hindered to exercise his function; though a particular form of church government be established by law, yet, if other ministers be not prohibited to exercise their function, or the laity to join in worship with them in a private manner, neither he nor they are guilty of any offence in so doing. (Greenshields v. Magistrates of Edinburgh.) 427

CONDICTION.

Devise in trust for A. for life, remainder to his first and other sons in tail-male: *And in case F. do not enrequest CONVEY AND*

SETTLE on A. two-thirds of the estate settled on F. A. shall have no benefit by the devise. This is a subsequent and not a precedent condition; and a devise by F. to A. of an equivalent estate, is a sufficient performance of the condition to entitle a Court of Equity to relieve against the breach. (Horne v. Popham.)

Devise in trust for E. in case *she, within three years after my death, marry G. for her life, remainder to her sons by G. in tail-male.*

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male. Quere, what kind of condition this is? (Bertie v. Lord Falkland. *Page* 10

C O R P O R A T I O N.

A company acting under a charter from the crown, unlawfully seize *A*'s. property to the value of 3000*l.* the company is put upon a new foundation by act of Parliament, with additional stock and new adventurers: The new company shall make satisfaction to *A.* for the injury of the old company. (African company v. Dockwra.) 327

C O S T S.

Executors guilty of a breach of trust or fraud, shall pay costs. (Bretland v. Cope.) 97

It seems that where the party to pay, deposits the sum which reasonably can be demanded, he is not to pay costs on his adversary obtaining a decree for the sum decreed. (Kirby v. Ormby.) 134

Executor's answer in equity being falsified, he shall pay costs. (Vaughan v. Thurston.) 175

An administrator suggesting a debt due to himself, and claiming to retain for it, and failing to prove it, is liable to costs. (Priffick v. Viguers.) 344

C O V E N A N T.

A. having built the stables and out-offices, and laid the foundation of a capital house, and carried it up one story, by his will devised his lands in trust, that out of the rents his house should

be finished according to *the model and design* begun; and *B.* the trustee, covenanted with the heir to allow 2000*l.* a year towards finishing the house accordingly: A model in woodwork left by *A.* shall be the only measure of the covenant, and no evidence admitted of *A*'s. intentional design; for model and design are here altogether synonymous. (Lord Conway v. the Duke of Buckingham.) *Page* 411

C R O W N.

Usage or prescription cannot divest the crown of that which can pass only by matter of record. (Harris v. Parker.) 197

C U S T O M.

A custom for the inhabitants of a town to grind their corn at the manor mill, decreed for in a Court of Equity without an issue, though the custom controverted. (Smallman v. Brayne.) 49

D E B T S.

A judgment creditor of testator bringing a bill for himself and other creditors, for an account of the testator's estate, and receiving part of his debt in average with other creditors, cannot afterwards, as to the remainder, insist on a priority. (Shepherd v. Kent.) 253

A bill is brought by creditors against *A.* for an account of debts due to them by *B.* whose estate *A.* is in possession of: *A.* pleads

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pleads that he is a purchaser without notice : This plea falsified by verdict : *A.* shall be decreed either to pay the creditors, or let them pay him, and take his estate; and accounts settled between them and *B.* shall not be unravelled into. (Lewis v. Fielding.) Page 316

Debts due by specialty liquidated by a master, and the sums due for principal, interest, and costs, ascertained under a decree, shall carry interest, and the interest be made principal at periodical rests, though thereby the fund for the simple contract creditors be altogether consumed. (Baker v. Austin.) 405

D E C R E E.

A decree obtained upon the defendant's answer, not set aside upon suggestion that the defendant was imposed upon to put in that answer. (Sherrard v. Harrcourt.) 233

A decree may be revived by bill of revivor as well as by *Scire facias*. (Cole v. Godfrey.) 354

D E P O S I T I O N S.

Suppressed on account of management in the interrogatories. (Dean and Chap. of Durham v. Mayor, &c. of Newcastle.) 22

Where the depositions on one side are taken, and the other obtains a rule to respite publication for three days, in order that he may examine, and obtains a rule accordingly on the terms of filing the affidavit, on which that rule obtained, and does not file

the affidavit till after he has examined his witnesses, his depositions shall be suppressed. (Altenson v. Doubten.) Page 299

D E V I S E.

Devise that trustees shall stand seized to the use of *A.* for life, remainder to *A.*'s first and other sons in tail-male, is but a tenancy for life in *A.* (Horne v. Popham.) 188

Devise in trust for *E.* for life, in case she within three years marry *G.* remainder to her sons by *G.* in tail-male, and for want of such issue, or in case the marriage shall not take effect within said three years, in trust for *F.* for life, and for his sons successively in tail-male. This will give but an estate for life to *E.* and an inheritance in tail-male general to *F.* and no estate whatever to *G.* (Bertie v. Lord Falkland.) 10

Devise of fee-farm rents, amounting to 126*l.* 6*s.* 8*d.* to exors, with directions that out of his personal estate they make up these rents 300*l.* per ann. and permit his daughter *S.* to take both for life, and afterwards her child or children charged with such sum as *S.* should appoint, and if no appointment, to convey to *T.* son of *S.* for life, and to his sons in tail-male, remainder to all *S.*'s sons successively in tail-male; remainder to testator's right heirs: If *S.* under idea of her power to charge to any amount, discharge the exors from the purchase, a Court of Equity will compel them

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them after her death to purchase, *C. in fee.*"—*A.* had afterwards lands to the amount of 3000*l.* a daughter—this daughter intitled them according to the will. (*Berkley v. Cope.*) *Page 39*

A. having five daughters, devises his estate to trustees upon trust, that if his daughter *F.* within six months after his wife's death, pay 6000*l.* to the trustees, to be divided amongst his four other daughters, then the trustees to stand seised to the use of *F.* and her heirs, and giving like time of pre-emption to the other four daughters successively. *F.* cannot have the time for her pre-emption enlarged; and by not paying the money, she forfeits her right of pre-emption. (*Woodman v. Willoughby.*)

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A. by deed, on his marriage, settles his estate upon the issue of the marriage, remainder to his own right heirs, and if he die without issue-male, and leave one daughter, then the lands to be charged with 3000*l.* for her at twenty-one, and 150*l.* yearly maintenance in the mean time. *A.* having then no issue, by his will devised in *hoc verba*: "And whereas by the settlement made on my wife, I have reserved the inheritance of my lands in myself after the estate-tail therein is spent: Now in case I die without issue, or that such issue shall die without issue of his, her, or their body, or that the estate-tail be limited by that settlement shall determine, I give all my said manors to my kinsman *B.* and to his first and other sons in tail-male; remainder to

C. in fee."—*A.* had afterwards a daughter—this daughter intitled under the will to the whole estate—and *B.* intitled to nothing. (*Cornwall v. Williams.*)

Page 117

Devise in the following words:—"Item. All the rest of my estate I give to be equally divided between my three daughters, *F. G.* and *A.* and all my grand-children and great grand-children, or so many of them as shall be living within two years next after my decease." This extends only to those then born, and not to any to be born within two years after testator's death. (*Trelawny v. Molefworth.*) 163

DISCONTINUANCE.

Inquisition in Chancery finding the forfeiture of the office of warden of the fleet, and traverses of the facts found; the *venire facias* issued out of Chancery in Michaelmas term, returnable in the King's Bench in Octab. Hill. (20th January) and in the memorandum in the Crown-office it was entered, that the transcript was delivered into the King's Bench the 3d of February. This was held by the Court of King's Bench after a trial at bar) to be a discontinuance, and judgment accordingly; but on a writ of error brought, the Lords reversed the judgment, and remitted the record to be amended, and made as delivered on the first day of Hilary term. (*The Queen v. Ford*)

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EQUIVALENT.

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EQUIVALENT.

Devise to *A.* for life, remainder to his first and other sons in tail-male: *And in case F. do not on request CONVEY AND SETTLE on A. and his heirs-male, full two parts in three of the estate settled on F. on his marriage, then A. to have no benefit by the devise.* *F. DEVISED* to *A.* an estate, and property equivalent to the estate settled, held a sufficient performance of the condition. (*Horner v. Popham.*)

Page 1

ERROR.

A judgment in a writ of error running thus: "Because in the record and process, and also in giving judgment of a plaint which was before the late King Charles." Where the plaint was begun in the time of King Charles, but the judgment not till King James, is itself erroneous; and though the Exchequer Chamber, upon the writ of error, reverse the judgment of the King's Bench, yet the King's Bench cannot award execution of the erroneous judgment.— (*Dighton v. Grenville.*)

65
Where the judges are equally divided in opinion on a writ of error, the former judgment stands. (*Dighton v. Grenville.*)

66

EVIDENCE.

If the party suffer evidence to go to the jury, though not strictly admissible, he shall not

make that a ground for a new trial. (*Tilly v. Wright*)

Page 33

On a bill brought by the Attorney General to discover a forfeited estate, depositions taken in another cause, between the person forfeiting and the person claiming, are not evidence. (*Atlibon v. Attorney General.*)

383
A. devises on trust to finish a house according to the model and design began by him: issue directed, whether the house was finished according to the model left by *A.* Evidence of what *A.* designed in his intention or fancy, not admissible on such issue, but the model the only measure. (*Lord Conway v. Duke of Buckingham.*)

411
A bill filed and not prosecuted, not to be read in evidence on the hearing of a cause upon another bill by the same party. (*Despard v. Ormsby.*)

459

EXECUTORS AND ADMINISTRATORS.

Executors guilty of fraud or breach of trust shall pay costs.

97

A bequest of 5*l.* a-piece to executors does not make them trustees for the testator's heir at law, as to the residue of the real and personal estate also bequeathed to them. (*Dormer v. Bertie.*)

128

Executor's answer being falsified in Equity, he shall pay costs. (*Vaughan v. Thurston*)

175

Executors shall, in a suit against them in Equity, be allowed

ed

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ed payments for testator's just debts made by them pending the cause in Equity. (Lord Orford *v.* Dafton.) Page 229

An executor intitled to retain for his own debt in preference to debts of equal degree. (*Shepherd v. Kent.*) 253

An administrator claiming to retain for his own debt, and failing to prove it, is liable to costs. (*Priffick v. Viguere.*) 344

E X T E N T.

The connusee of a statute not precluded from entering under his extent, by a fine levied by the connusor or any coming in under him, if he enter within five years after satisfaction. Allowed on the record of a prior statute extended. (*Dighton v. Grenville.*) 66

The connusor of a statute extended, is but as tenant at will to the connusee, with reversion in fee after the extent satisfied. (*Dighton v. Grenville.*) 68

F E L O N S G O O D S.

The goods and chattels of felons are a flower of the Crown, and cannot pass from the Crown by implication, but only by grant, by plain and express words. (*Harris v. Parker.*) 197

F I N E.

A. acknowledges a statute to *K.* afterwards another to *G.* and afterwards a third to *B.* Execution is sued, and the estate of *A.* extended upon each: the sta-

tutes to *K.* and *G.* are assigned to *E.* and *A.* then sells his estate to *L.* and levies a fine with proclamations to him. *L.* devises the estate to *E.* who also levies a fine with proclamations to the use of himself and his heirs. *D.* the administrator of *B.* and also of *G.* acknowledges satisfaction on the statute to *G.* and then, ten years after the last fine, upon which no claim had been, enters under the statute to *B.* The extended interest on the statute to *K.* was merged by being assigned to the same person to whom *G.*'s statute was assigned; and the fine levied by *A.* operated only upon his reversion in fee, and did not divest the extended interest upon the statutes of *B.* and *G.* and so five years non-claim no bar to these extents. And tho' the fine levied by *E.* may operate as a forfeiture of *G.*'s extent as to *E.* himself, yet, as to strangers, the right exists; and it is not necessary to make any claim within five years from that fine, nor until five years after that statute satisfied on record. *D.* may enter within five years after the fine, but he may waive that right, and shall have a new five years' from the satisfaction acknowledged of record. (*Dighton v. Grenville.*) Page 64

F O R F E I T U R E.

A. having his estate mortgaged, is attainted of treason; the Attorney General brings a bill in the Exchequer to discover the estate

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estate, and what part mortgaged, and offers to pay any sum due. The heir of him attained absconds; service of process on him shall be substituted by the Court, and issues directed to inquire of the estate, and whether the alleged mortgage really executed, and what sum really advanced by the mortgagee. (*Alibon v. Attorney General.*)

Page 393

FORGERY.

After four trials at law, whether a bond forged or not; on the first, a verdict for the bond; second, the plaintiff non-suited upon full evidence; third, a nonsuit in a point of form; fourth, a verdict for the bond. Upon an appeal from the dismissal of a bill filed by the administrator of the supposed obligor, the Lords granted a new trial; upon which the bond was found to be a forgery. (*Scott v. Hilton.*)

318

FRAUDS.

Stat. of. See parol agreement.

Though the suggestions of fraud be probable and apparent, yet if the party complaining, by his own solemn act acquiesce, Equity will not relieve. (*Lloyd v. Tym.*)

14

FREEHOLD.

Whosoever an assize of novel disseisin will lie for, is thereby proved to be a freehold. (*Owen v. Saunders.*)

73

GUARDIAN.

The Court of Chancery in England ordered a guardian to a minor in Ireland, both resident in Ireland, and whose estate was in Ireland, to give a recognizance of 2000*l.* that the minor should not be married without leave of that Court; but this order does not appear to have been obeyed. (*Matthew v. Phillips.*)

Page 351

INCROACHMENT.

On a bill in Equity founded on a prescription, complaining of an incroachment. The Court will direct issues to try the right, and also the prejudice. (*Dean and Chapter of Durham v. Mayor, &c. of Newcastle.*)

18

INFANT.

Cestui que trust intitled to the same relief against a mortgagee of his trustee, as against the trustee himself. (*Peyton v. Brown.*)

42

Infant concluded by an arbitration as to the personal estate entered into between her mother and her father's partner in trade, relative to dealings in trade. (*Hervey v. Western.*)

79

A decree made against an infant, is unless cause after age attained. (*Williams v. Williams.*)

101

INUNCTION.

To stay waste, granted against a tenant for life having no issue, though

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though but thirty years old. (Horner v. Popham.) Page 8

Perpetual Injunction granted against a verdict found in favour of a co-heiress at law, a will of the ancestor appearing. (Wilson v. Story.) 382

I N T E R E S T.

It seems interest for money lent, is not demandable or payable during the time of a public rebellion in the kingdom. (Kirby v. Ormsby.) 134

Is recoverable in Equity for money deposited, though no security be given for it. (Cole v. Godfrey.) 354

Interest liquidated on specialties, under a decree shall become principal, and bear interest at periodical rests, though it confirm the fund for payment of simple contract creditors. (Baker v. Austlin.) 405

I N T E R R O G A T O R I E S.

Where leave is given to add an interrogatory for one purpose, it shall not be extended to another. (Dormer v. Bertie.) 128

I S S U E S.

Three different issues directed by Chancery, to try whether a bond paid or not. (Brown v. Bradford.) 8

Directed on a bill founded on prescription. (Dean and Chap. of Durham v. Mayor, &c. of Newcastle.) 18

Refused to be directed to try a custom to grind at a manor mill, though the custom contro-

verted. (Smallman v. Brayne.) Page 49

Directed, and verdict thereon certified to be against evidence, new trial granted, and same verdict on the same evidence refused to be set aside. (Williams v. Williams.) 100

Not directed where by the act of the party desiring it, it is become impossible to have it unequivocally tried: As to try whether the cloth of a regiment's cloathing was agreeable to the pattern, after the cloaths worn out. (Lloyd v. Cardy.) 153

Though a party improvidently tender an issue at law as to one substantive fact, he may notwithstanding put his case on a different ground by a bill in Equity. (Tidcombe v. Cholmley.) 166

Issue directed to try whether a deed was raised after it had been executed or before: Found raised *after*, decree thereon:—Then appeal—and new trial—found raised *before*. New trial on petition, found raised *before*; then the decree affirmed. (Thwaites v. Deye.) 179

When in a mortgage cause it was disputed how the mortgage money made up, viz. whether one sum did not include another, an issue was directed to ascertain the matter. (Rowe v. Cockayne.) 310

After a party has submitted to try certain issues agreed on at the hearing, he shall not complain that these issues were improper. (Despard v. Ormsby.) 459

JUDGMENT.

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YUDGMENT.

Where the judges are equally divided in opinion on a writ of error, the former judgment stands. (*Dighton v. Greenville.*)

Page 66

LANDLORD AND TENANT.

Tenants who hold over their terms, not to be permitted to set up a title in any other person against their landlord, whose title by their lease they had acknowledged and held under. (*Handcock v. Shean.*)

122

MARRIAGE.

Devise in trust for *E.* in case she within three years marry *G.* for her life, remainder to her sons by *G.* in tail-male, and for want of such issue, or in case the marriage should not take effect within said three years, in trust for *F.* If the marriage do not take effect, no matter how prevented, *E.* will have but an estate for her life, and *F.* the inheritance in tail-male. (*Bertie v. Lord Falkland.*)

10

Articles intitled, "Articles agreed on the 6th of March, 1672, in order to a contract to be speedily had between young *S.* and *M.* for a marriage to be solemnized between them in 1678;" importing to be for a settlement without power of revocation, are specifically executed by a settlement afterwards previous to the marriage, with power of re-

vocation; and no further execution will be decreed. (*Mathew v. Phillips.*)

Page 347

MASTER AND SERVANT.

A servant by his master's orders seises *A.*'s property, worth 236*ol.* and delivers it over to his master, and has 700*ol.* of it for his service. *A.* recovers the whole against the servant; he shall not abate the 700*ol.* paid him for his service. (*African Company v. Dockwra.*)

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MESNE RATES.

Tho' an action of trespass for mesne profits be a consequence of a recovery in ejectment, yet if pending an action for mesne rates, the defendant in ejectment recover in an ejectment brought by him, a Court of Equity on a bill brought for the purpose, shall injoin against proceeding in that action. (*Parker v. Stillingfleet.*)

337

MONEY.

A wife's portion agreed to be invested in the purchase of lands, is laid out by the husband on a mortgage, yet, after his death, considered merely as his personal estate. (*Farrel v. White.*)

146

MORTGAGE.

Mortgage from a guardian's husband, shall account with the minor, as the guardian himself should have done. (*Peyton v. Brayne.*)

42

I i *A.* articles

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A. articles to sell his estate to *B.* for 10,500*l.* and that *C. A.*'s brother, should take a lease of part of the land for ten years at 24*5**l.* rent, and *A.* be bound 2000*l.* for payment of it: *B.* pays 4500*l.* of the purchase money, and mortgages back to secure the 6000*l.* residue. On a bill by *B.* to redeem, and a cross bill by *A.* to foreclose, *A.* decreed to stand in the place of *C.* as to the rent.— (Doughty *v.* Cotton.) Page 85
Money paid to the mortgagee's scrivener is a good payment. (Sharp *v.* Thomas.)

A. owes *B.* money, and writes him a note that he will mortgage certain lands to him for his security. *A.* dies before any mortgage executed. The lands so agreed to be mortgaged, shall be considered as assets applicable to pay *B.* before any other creditor of *A.* (Shepherd *v.* Kent.) 253

A mortgagee in possession, is accountable not only for what he actually receives, but for what without his wilful default he may have received. (Rowe *v.* Cockayne.) 312

NE EXEAT REGNO.

Security given on a writ of *ne Exeat Regno*, to be vacated and discharged upon a decree passing in favour of the party. (Parker *v.* Burroughs.) 262

O A T E S.

Doctor Titus—Some account of him, 262

O F F I C E.

An office which is a freehold cannot be appointed to during pleasure, but during good behaviour. (Owen *v.* Saunders.)

An office of freehold may be appointed to by parol, and an imperfect prior appointment by deed, will not vitiate or affect it. (Owen *v.* Saunders.) 73

The escape of prisoners a ground of forfeiture of the office of Warden of the Fleet. The Queen *v.* Ford.) 322

PAROL AGREEMENT.

B. in consideration of a parol agreement with *A.* for a lease of ground, pulled down divers old houses, and built many new, and acted uniformly as owner; and *B.* made leases, and received the rents. *A.* in his last sickness, bade *B.* have leases prepared according to the agreement, and a precedent which he gave him, which was done; but the leases not executed on account of some mistake in them, and *A.* died. Tho' this agreement was not originally reduced to writing, yet being so far materially executed on *B.*'s part, it ought to be reciprocally performed on the other: Equity will decree it according to the leases so prepared. (Lester *v.* Foxcroft.) 108

An agreement recited in a writing, and in part executed, is not a parol agreement, nor within the state of frauds. (Pride *v.* Button.) 246

PARTIES.

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PARTIES.

Want of proper parties in the original cause is good ground of appeal; but the party appealing on that ground, must procure the answer of the party whom he shews to be necessary. (*Hancock v. Sheen.*) Page 122

Where it is alleged that the person making the conveyance was but tenant for life, with remainder in tail to another, the alleged remainder-man must be a party to any bill in which that question is agitated. (*Hancock v. Shaen.*) 122

The captain of a ship of war is sent out to assist the African company, and he seizes *A*'s ship and cargo, and delivers them to the company, who confiscate them. *A.* afterwards recovers the full value against the captain in an action of trover; the captain brings a bill against the company to be reimbursed—the company shall not complain that they were not parties in the action at law; nor that *B.* who owned part of the cargo, was not a party in Equity: (*African Company v. Dockwra.*) 327

PARTNERSHIP.

Covenant in articles of partnership that the surviving partners should save the executors of the partner dying from the partnership debts, and take no advantage of survivorship, and should one month after the death of any partner, render an account in writing of the stock in trade to his executors: The

plain meaning of this agreement is to entitle the executors of the partner dying to an account within a month, whilst matters are fresh in memory: But an account delivered accordingly, and not objected to within a reasonable time, shall on any subsequent dispute be considered as a stated account. (*Morris v. Harrison.*) Page 157

Articles of partnership are entered into between *A. B. C.* and *D.* and recite that each had paid his full proportion of the stock, though *D.* only had really paid any, but was imposed on by the others to believe each had; and was also seduced to write letters, approving of their conduct in the partnership. The fraud being discovered, the other partners decreed to re-pay *D.* his whole stock and interest, and he not concluded by his own signature and letters. (*Pillans v. Harkness.*) 442

PAYMENT.

Money paid to the scrivener of the mortgagee, is a good payment. (*Sharp v. Thomas.*) 224

PERSONAL ESTATE.

The property of household goods and plate being on the marriage of the owner vested in trustees, to permit her to use them during her life, and after her death to deliver them over to the persons who should then be entitled to the trust of the dwelling-house, according to limitations thereof in a separate deed

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deed :—Though the trusts of the house cannot take effect, yet the persons named in that limitation shall be intitled to the goods. (Stokes v. Clarke.)

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P L E A.

Where a trustee's husband on a suit instituted by him against an infant, *cestui que* trust, and also in the infant's name against himself, procures accounts to be decreed, and a balance struck due to him, and then mortgages that balance, and other property to a stranger, the mortgagee shall not plead that account so decreed to a bill brought afterwards by the infant for a general account, suggesting fraud. (Peyton v. Browne.)

42

P O R T I O N S.

A. conveyed his effects in trust in failure of issue male to raise 5000*l.* for daughters, payable at eighteen or marriage, and having issue a son and daughter, and recollecting that the provision for daughters by the former settlement was only in failure of issue male, executes a new settlement, and conveys the lands to the same trustees to raise 5000*l.* for daughters, payable at sixteen or marriage, and died; the son also died under age, and the daughter died after eighteen, having by a nuncupative will given "all in her power to her mother." One 5000*l.* only shall be raised; and that 5000*l.* shall be raised notwithstanding the es-

tate descended upon the daughter. (Thomas v. Kemeys.)

Page 112

A. has three daughters, and is indebted to *M.* his mother-in-law, 1400*l.* which she releases, provided he add 500*l.* a-piece to his daughter's fortunes; he, by his will, leaves each daughter 3300*l.* which exceeds their fortune above 500*l.* but takes no notice of the 1400*l.* The legacy is a satisfaction for *M.*'s bounty. (Hasel v. Knatchbull.)

305

P O W E R.

Testator directs executors to make up fee farm rents, which amounted to 126*l.* 6*s.* 8*d.*—300*l.* and to permit his daughter *S.* to receive both during her life, charged with such sum as she should appoint; and for want of such appointment, trustees to convey to *T.* son of *S.* for life, and his sons in tail-male, remainder to all the sons of *S.* in tail-male, remainder to testator's right heirs.—The power of her charging is only for the benefit of her children, and must be restrained to the same persons to whom the estate was limited: And *S.* on the presumption of such power to charge, cannot discharge the executors from the trust to purchase; and if she do, they will after her death be compelled to purchase, and settle according to the will. (Berkley v. Cope.)

39

P R A C T I C E.

Where there is reason to suspect

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pect that the plaintiff is a fictitious person, and set up by any of the parties to have former proceedings ravelled into, the Chancellor will direct it to be referred to a Master, to inquire at whose instance the bill is brought, and the parties and solicitor shall be examined on interrogatories. (*Doughty v. Cotton.*) Page 85

P R E E M P T I O N.

When a right of preemption of an estate is given by deed or will to one child, on paying a certain sum within a limited time, if not paid within the time the right is forfeited for ever. (*Woodman v. Willoughby.*) 74

P R E S C R I P T I O N.

On a bill in Equity by a corporation, founded on a prescription, complaining of an encroachment, the Court will direct issues to try the right, and also the prejudice. (Dean and Chapter of Durham *v.* Mayor, &c. of Newcastle.) 18

A. has a mill in *S.* to which he claims moulture by prescription, and pulls it down, and builds another some distance from it. The prescription is destroyed in law, and *A.* can have no relief in Equity for the moulture. (*Pierston v. Miles.*) 263

P U R C H A S E R without Notice.

If on a plea of purchaser without notice, an issue be directed

and found against the plea, the defendant will be decreed to reconvey on being paid his money, or to pay the creditors by whom the bill is brought: and accounts settled between them, and the common debtor shall not be ravelled into. (*Lewes v. Fielding.*) Page 361

A. having a debenture for forfeited lands, agrees with *B.* on certain terms to sell the whole for a certain sum, and a conveyance accordingly, but the whole money not being paid, takes back a conveyance of so much as should be security for the difference. *B.* passes patent for the whole, and mortgages to *C.* who has no notice of *A.*'s title to the part. *A.* shall not be relieved against *C.* (*Perry v. Mervyn.*) 375

Otherwise, where the lands remain in the family of the fraudulent patentee, though the heir claim to be a purchaser under a family settlement. (*Shec v. Lawless.*) 450

R E B E L L I O N.

It seems that arrears of interest, annuity, rent, or jointure, which accrue in a time of open rebellion, are not recoverable under a bill in Equity. (*Kirby v. Ormsby.*) 134

R E C O R D S.

The Court of Exchequer made an order for filing an ancient record which had been many years off the file, by which means such record would become

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come evidence. *A.* conceiving himself aggrieved, appealed to the Lords, who ordered that the alleged roll should be brought into their house; and directed an issue to try whether these parchments were the perfect, unaltered, exact, and entire commission originally filed, and that until such issue tried they should not be evidence in any court whatsoever. (Lord Wharton *v.* Squire.) *Page* 270

2. Hearing. 373.
REVIEW.

A merchant importer intitled to certain allowances on the King's duties under an act of Parliament, accepts of a less allowance affixed by the Commissioners of Customs, with the consent of the merchants in general: He cannot afterwards claim the statutable allowance. (*Jefferys v.* Attorney General.) 202

Where a discount of *5l. per cent.* is allowed to the merchant on importation duties, for prompt payment, by one act of Parliament, and a subsequent act of new impost doubles the duties, and allows *10l. per cent.* discount for prompt payment, to be collected and paid in the same manner, and with such advantages as in the former act: This does not intitle the merchant to the *5l.* and also to the *10l. per cent.* discount, but to the latter only. (*Sanders v.* Shaw.) 295

REVIEW. *Bill of*

On an appeal from the dismissal

of a bill of review, no objection can be made to the justice of the decree, which was not assigned for error in the bill of review. Objections to the Master's report are no grounds for a bill of review: Every error assigned against a decree by a bill of review, ought to appear in the record itself. (*Watkins v.* Price.) *Page* 389

SATISFACTION.

A. indebted by bond to *B.* 60*l.* many years after by his will leaves her an annuity of 15*l.* This annuity is not a satisfaction of the bond debt. (*Yates v.* Lewis.) 172

A. has three daughters, and owes *M.* 1400*l.* which she releases if he will add 500*l.* each to his daughters' fortunes: He leaves each by will 5300*l.* which exceeds their portion above 500*l.* but says nothing of the 1400*l.* This is a satisfaction for their share of that money. (*Hassel v.* Knatchbull.) 305

T A I L.

The remainder-man in tail must be made a party to a bill in which the validity of a conveyance by the tenant for life, is questioned. (*Hancock v.* Shaen.) 122

T R I A L. *New.*

If the party suffer evidence to go to the jury, (though not strictly admissible) he shall not make that a ground for a new trial. (*Tilsley v.* Wright.) 33

After

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After four trials at law, whether a bond forged or not;—on the first, a verdict for the bond; second, plaintiff nonsuited upon full evidence; third, a nonsuit but not on the merits; fourth, a verdict for the bond—and thereupon a bill brought by the administrator of the supposed obligor dismissed. The Lords, on an appeal, directed a new trial. (Scott v. Hilton.) Page 318

T R O V E R.

Trover lies against a navy captain for a ship and cargo seized by him, under a commission from the King to assist the African Company, their charter being a monopoly, and illegal. (African Company v. Dockwra.) 327

T R U S T.

A. possessed of a leasehold interest in lands, under the See of *Wales*, for three lives, of which *A.* himself is the last, dies, leaving *B.* guardian to his children. *B.* renews the lease with the Bishop, and pays her own money for the fine, and nominates the lives of *A.*'s children, and so continues to renew during her life. These renewals are not a trust for the children of *A.* but *B.* may dispose of the lands at her pleasure. (Earl Sandwich v. Earl Litchfield.) 101

Trust terms for raising portions for daughters, are not discharged by the inheritance descending upon a daughter. (Thomas v. Kemys.) 112

A lease of church lands for

the lives of *A. B.* and *C.* is on the marriage of *A.* with *D.* and with his consent conveyed to trustees to permit *A.* to receive the rents during her life, and her children after her death; remainder to *E.* and his children: *B.* and *C.* die in *A.*'s life-time, and then *A.* after whose death *D.* obtains a renewal of the lease in his own name: This renewal is not a trust for *E.* but belongs wholly to *D.* (Stokes v. Clarke.) Page 192

A corporation being appointed trustees of a fund for charitable purposes, if the fund increase by time, the increase is also applicable to the augmentation of the charities. (Attorney General v. Mayor of Coventry.) 280

A. passes patent in his own name on a decree of innocence for forfeited lands, which had on his own marriage with the daughter of *B.* been settled on the issue of that marriage, as the estate of *B.* and dies, leaving *D.* his only daughter by the first, and *C.* his son by a second marriage, who gets possessed of these lands, claiming them as heir to *A.* the patentee. Decreed that *A.* was trustee for his daughter, and *C.* to convey accordingly. (Pilley v. Madden.) 366

A. executor, declines to act in a trust committed to him by the testator, procures his co-executors and *cassui que* trust to join in a lease of iron works and woods to *J. S.* from whom he afterwards takes an assignment. This assignment fraudulent, and a trust

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a trust for the original *cestui que* trust, and *A.* shall be accountable for the full profits, and shall not have an allowance which was appointed for him by the testator, in case he managed the works for his children's benefit.) (*Despard v. Ormsby.*) *Page* 459

T R U S T E E S.

Cannot accept a discharge of a trust to purchase lands to be settled on the sons of *S.* in tail, from *S.* who is to be tenant for life of the lands to be purchased, if they do they shall make it good of their own estate after her death. (*Berkley v. Cope.*) 39

T R U S T H E S.

Where a modus of 20*s.* was set up by the parishoner, and the parson had entered into a special agreement to accept of that composition, and had for many years given a receipt accordingly; and had also entered into an agreement to be paid moreover 10*s.* yearly; on a bill filed by the parson to be decreed to the tythes generally, the Court of *Exchequer* dismissed his bill, and held him to his agreement; but the Lords reversed the decree, and ordered the Court of *Exchequer* to hear the cause, as to the right of the tythes, notwithstanding the agreement; and the Court of *Exchequer* having, on the further hearing, directed issues to try the validity of the modus; and whether part of the lands

parol of the parish. The Lords, on a further appeal, affirmed that decree. (*Dent v. Buck.*)

Page 182

Where the parishoner insists on a modus, and it appears that the parishoners had usually paid differently, the alledged modus will be disregarded, and he decreed to account for his tythes in kind; and where the matter is plain, the Court will not direct the modus to be tried at law. (*Charlton v. Bayly.*) 206

Wales. See Appendix.
W A S T E.

Tenant for life having no issue, though but thirty years old, restrained by injunction from committing waste. (*Horne v. Popham.*) 8

W I F E.

Her provision (an annuity) settled payable out of a real estate, decreed a charge upon the personal estate, because the real failed. (*Griffith v. Anvill.*) 52

W I L L.

Leave may be granted to add an interrogatory touching the discourses of the defendant (who drew the will) concerning the will, but never touching the testator's discourses; for parol proof ought not to be admitted to alter the construction of a written will. (*Dormer v. Bertie.*) 128

Devise to all his grand-children and great grand-children who should be living within two years after his decease: Parol evidence

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evidence admitted that testator did not intend any such, who should be born within two years after death. (*Trelaway v. Molef-worth.*)

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W I N D O W S.

Sash windows, or crown glais, not known in *England* in 1683.

414

W I T N E S S.

A. brought a written order

from *B.* to *C.* for 200*l.* which *B.* alledged he paid him accordingly in actual cash, and for which *C.* signed a receipt. In a suit between *A.* and *B.* relative to this 200*l.* *C.* is a good witness to prove he never received the money, notwithstanding his own receipt; because, swear which way he will, he makes himself debtor to one of the parties. (*Oldbury v. Wynne.*)

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T H E E N D.



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